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1-16-76

FILED

DEC 4 - 1944

JOHN W. MENZIES
CLERK

No. 9793

UNITED STATES CIRCUIT COURT OF APPEALS

SIXTH CIRCUIT

see Vol 2265

Vol
2356

ESTATE OF B. H. KROGER, Deceased,
CHESTER F. KROGER, IRVING W.
PETTENGILL, RUDOLF HOMAN and
THE PROVIDENT SAVINGS BANK
AND TRUST COMPANY, Executors,
Petitioners,

v.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent.

ON PETITION to Re-
view the Decision
of the Tax Court
of the United
States.


Decided December 4, 1944.

Before HICKS, HAMILTON and MARTIN, Circuit Judges.

MARTIN, Circuit Judge. The Tax Court decided that there is an \$8,647,700.89 deficiency in the estate tax due from appellants as executors of the will of the decedent, B. H. Kroger. The decision of the Tax Court was grounded upon its finding that the creation by the decedent of two trusts by indenture of February 13, 1928, and the contemporaneous transfer by him of Treasury notes of \$12,000,000 face value, to the nominated trustees were for the purpose of barring the lady whom he was about to marry from any statutory rights as his wife in the transferred property should she survive him, and were made in contemplation of death.

The pertinent statute applied by the Tax Court is Sec. 302(c) of the Revenue Act of 1926, which provides:

"The value of the gross estate of the decedent shall be determined by including the value at the



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DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

H

December 8, 1944.

Paul P. O'Brien, Clerk,
Circuit Court of Appeals
for the Ninth Circuit,
San Francisco, 1, California.

Vol
2356
/

Re: George A. Koch, Executor of the
Estate of Adolph J. Koch vs.
Commissioner of Internal Revenue.

Dear Mr. O'Brien:

In connection with the above entitled case which was argued some time ago before Judges Mathews, Denman and Healy, we think we should call the Court's attention to the case of Kroger v. Commissioner, decided by the Circuit Court of Appeals for the Sixth Circuit on December 4, 1944. That case involves the same question as is involved in the Koch case, namely, whether certain gifts were made in contemplation of death. For the convenience of the Court we are enclosing three photostat copies of the decision and should appreciate it if you would hand one of them to each of the judges who heard the Koch case.

We are sending a copy of this letter to taxpayer's counsel.

Respectfully,

For the Attorney General,

SAMUEL O. CLARK, JR.
Assistant Attorney General.

DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

December

Paul P. O'Brien, Clerk,
District Court of Appeals
for the Ninth Circuit,
San Francisco, California.

Re: George A. Koch, was
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Commissioner of the

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of the judges who heard the Koch case.

We are sending a copy of this to
counsel.

Respectfully

Very truly

W. J. B. O.
Assistant Atty

time of his death of all property, real or personal, tangible or intangible, wherever situated—

“(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth.”

In *McGrew's Estate v. Commissioner of Internal Revenue*, 135 F. (2d) 158, 160 (C. C. A. 6), we pointed to the holding of the Supreme Court in *Colorado Nat. Bank v. Commissioner of Internal Revenue*, 305 U. S. 23, 59 S. Ct. 48, 83 L. Ed. 20, that the decision of the Board of Tax Appeals (now the Tax Court) as to whether a transfer was made in contemplation of death is a question of fact upon which the decision of the Board, if supported by substantial evidence, is conclusive. In demonstrating the limited power of circuit courts of appeal upon review of issues of fact in tax cases, we quoted (pp. 160, 161) from *Wilmington Trust Co., Executor, v. Helvering, Commissioner of Internal Revenue*, 316 U. S. 164, 168, 62 S. Ct. 984, 986, 86 L. Ed. 1352, as follows: “It is the function of the Board, not the Circuit Court of Appeals, to weigh the evidence, to draw inferences from the facts, and to choose between conflicting inferences. The court may not substitute its view of the facts for that of the Board. Where the findings of the Board are supported by substantial evidence they are conclusive. [Citing cases.] Under the statute the court may modify or reverse the decision of the Board only if it is ‘not in accordance with law.’ ” [See 44 Stat. 110, Sec. 1003(b), 26 U. S. C. Sec. 1141(c)(1).]

We listed other decisions of the Supreme Court to the same effect and referred to our case of *Crowell v. Commissioner*, 62 F. (2d) 51, 53 (C. C. A. 6). To these authorities should now be added another from the highest source prescribing even more sweeping inhibitions upon the Circuit Courts of Appeal in reviewing the Tax Court. See *Dobson v. Commissioner*, 320 U. S. 489, 502 [rehearing denied, 321 U. S. 231] where the mandate was given that “when the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law the decision of the Tax Court must stand.”

With these legal principles in mind and with the understanding that whether a gift *inter vivos* was made in contemplation of death within the meaning of a Revenue



Act depends upon the dominant motive of the donor in the light of the circumstances of the case (*United States v. Wells*, 283 U. S. 102, 51 S. Ct. 446, 75 L. Ed. 867), we consider the insistence of appellants that the decision of the Tax Court should be reversed and the case remanded with instructions to redetermine the deficiency by excluding from the gross estate the value of the property transferred to the two trusts established by the instruments of February 13, 1928.

Appellants urge that there is no substantial evidence in the record to support the Tax Court's finding that the transfers in trust were made in contemplation of death; and assert that, on the contrary, the transfers were made by the decedent in contemplation of and in preparation for his marriage and were not and could not have been substitutes for testamentary disposition.

A biography of B. H. Kroger, whose vigorous life spanned from early in 1860 to midsummer in 1938, would doubtless stimulate any American youth ambitious to become a merchant-prince. The open sesame to Kroger's great wealth was the merchandising of food. At an early age, he engaged in the grocery business in his native city, Cincinnati, Ohio. Steadily growing and prosperous, the business was incorporated in 1902 under the name of Kroger Grocery & Baking Co., which became forthwith owner and operator of 30 stores. A quarter-century later, this company was operating 6,000 stores. Throughout this full period, Kroger had been the principal stockholder and the president of the company.

Upon completion of 25 years successful operation of the company, Kroger received in late 1927 an offer for his stockholdings at a price which he considered so much in excess of its intrinsic value that he "could not afford to refuse it." So, in January, 1928, he sold his stock for \$24,397,000.00 cash, and invested this sum largely in United States government securities.

While accumulating a fortune from the successful conduct of the grocery business, Kroger became interested in banking also, first as a substantial stockholder and director of The Provident Savings Bank and Trust Co., Cincinnati, Ohio, and in 1901 as president of that institution. In 1926 he was appointed a director of the Federal Reserve Bank of Cincinnati and served in that capacity until 1936. After selling his stock in the Kroger Grocery & Baking Co., he resigned as its president and also as president of the bank, but retained his official capacity as Chairman of the Board in both institutions.

Even during his active career, this dynamic business man was no slave to his desk. He took time out for exercise and recreation and kept himself physically fit, playing for some twenty years in a regular foursome 18 holes of golf almost daily over the hilly course of the Cincinnati Country Club. With pardonable pride, a one-time Treasurer of the United States testified that while Mr. Kroger took his game seriously, he was "only a fair golfer" and that the Treasurer—if not the Treasury—"could generally trim him out of a few dollars."

Nor were long vacations neglected. Beginning in 1920, Kroger went to Florida every winter—generally leaving Cincinnati after the November elections and sojourning in the fair land of flowers through April. He acquired a winter home in Palm Beach. His habits on Florida vacations, as described by his son, were to arise early and start playing his "inveterate" golf between half past eight and nine in the morning. After his golf game, followed a sun bath and swim, then a home luncheon at 1 p.m. and a bridge game in the afternoon at the Old Guard Society, an organization of Palm Beach golfers whose prerequisite to membership was winter residence in Palm Beach for at least five consecutive years. After dining at home, he usually attended a show or intermingled socially with friends. He drove his own automobile, not only around town in Cincinnati but on long cross-country trips. After attaining three score and ten, Kroger was an unusually physically active man for one who had lived to that mellow age.

Though testimony concerning his frequent but non-confining colds, quinsy sore throat, non-toxic substernal goitre and chronic constipation was received at the trial, the Tax Court found—and we think justifiably on the evidence—that at the time he created the trusts in issue, the decedent was in good health and was not motivated by any concern for his health.

Looking now to the situation of the Kroger family and the circumstantial setting in which the trusts were created, we observe that decedent's first wife, mother of his two sons and four daughters, had died in 1899. For nearly 29 years, he remained a widower. He was thoughtful of his children and very fond of his grandchildren. The whole Kroger family appeared well knit. They frequently gathered for Sunday night suppers. The patriarch manifested affection for his daughters and concern for their welfare. His friendliness toward his sons-in-law was manifest. To his sons he wrote affectionate letters, conferred with them concerning his in-

vestments and entrusted them with the keys to lock boxes containing the bulk of his wealth. His affection for them and confidence in them was deep.

But at age sixty-eight the dynamic Kroger became tired of his unmarried status. He decided to re-marry—to marry a lady much younger than he. The exact difference in ages is not definitely revealed in the record.

In the latter part of January, 1928, his son Chester and his daughter-in-law visited him in Palm Beach. About three days after their arrival, he informed Chester that he intended to marry and asked him what he thought of it.

"That is for you to decide," his son replied.

"What will your sisters think about it?" the father questioned.

"I don't know. I think they should feel the same way I do," Chester answered.

"That's all right. I would like to make a prenuptial agreement with Alice [the bride elect]," the elder Kroger announced.

The son demurred: "What do you want to do that for?"

The father replied that he did not want the bulk of his estate to go to his intended wife; he wanted his children and "own blood grandchildren" to have the benefit of it.

Chester Kroger testified that he disliked "the prenuptial agreement idea;" that it struck him as not amounting to much; and that it might get his father "in for a lot of lawsuits." He told his father that he should like to talk to the latter's successor as president of The Provident Savings Bank & Trust Company, Leo J. Van Lahr of Cincinnati, who was then in Florida at the Breakers Hotel. The suggestion was agreeable to his father. Chester immediately consulted the banker, who agreed that a prenuptial contract was inadvisable and suggested, in lieu, an irrevocable trust. The suggestion was passed on by the son to the father, who would not, at first, adopt it. The elder man seemed to fear that "he was irrevocably giving away money and had nothing to say about it." In some seven days, however, he became convinced that an irrevocable trust was the better plan and stated to his son that he had discussed the matter with "Alice" and "the arrangements were satisfactory to her."

Harley S. Hamilton, an attorney associated with the Trust Department of The Provident Savings Bank & Trust Co. of Cincinnati was directed to come to Palm Beach and, upon arrival, drafted the trust agreements.

The attorney had no direct contact with the decedent until the occasion when the instruments were signed. At that time, he volunteered the opinion that the execution of the trusts would not save any taxes. The Tax Court found that the evidence shows that the transfers were not made by the decedent for the purpose of avoiding either income or estate taxes.

The trust instruments were prepared by the Cincinnati attorney upon instructions from Chester Kroger as to irrevocability, trustees to be named, disposition of income and the like; but no direction was given the draftsman concerning the powers of the trustees and the reservation of powers by the trustor. The lawyer drew these provisions to effectuate his own understanding of the powers customarily vested in trustees.

Under the terms of the trust indentures, the trustees were required to pay the entire net income to the donor for life; and upon the donor's death to pay such net income to his surviving children in equal shares, and to the issue of any deceased child *per stirpes*. Upon the death of the survivor of the donor's children, the corpus was required to be distributed in equal shares to the surviving grandchildren of the donor, and *per stirpes* to the issue of any deceased grandchild.

The trust instruments provided further for authorization of the trustees to sell any part of the trust property *upon the instructions or consent in writing of the donor during his life*. Subject to like restrictions, the trustees were empowered to invest and reinvest in stocks, securities or real estate when deemed to the best interest of the estate.

In neither of the trust instruments did the donor retain any reversionary interest, contingent or otherwise, in the corpus of the trust estate. In neither of them did he retain any power of revocation or amendment. But he did retain the trust income for life for his own use.¹

¹ It should be commented that the Commissioner of Internal Revenue determined a deficiency of \$12,524,987.81 in the estate tax liability of the decedent, B. H. Kroger. After receiving evidence upon the contested issues, finding the facts and filing an opinion in the proceeding for redetermination of the deficiency, the Tax Court entered its decision reducing the deficiency determination to \$8,047,700.80. The Tax Court held that gifts by the decedent of \$1,000,000 to each of his six children on January 31, 1928, were not made in contemplation of death and were not a part of his gross estate, and also that the creation of a trust by instrument of January 21, 1928, with a contemporaneous transfer of property to trustees, was not done in contemplation of death. Inasmuch as these rulings of the Tax Court are not challenged or involved on this appeal, discussion of them seems inappropriate, except to say that the Tax Court found that the decedent made the absolute gifts to his children in order that they might receive training and experience in the handling of money, enjoy it while they were young, live comfortably, and educate

On March 3, 1928, two and a half weeks after the execution of the trust instruments with which we are concerned, the decedent, B. H. Kroger, married Mrs. Alice Farrington Maher at his winter home in Palm Beach, Florida. His son Chester and other members of the family attended the ceremony. The bridal couple, with the bridegroom driving the car, motored to the west coast of Florida for their honeymoon trip. In May, 1928, they went to Cincinnati and remained there until August 9, 1928, when they set forth upon a several months' tour of Europe. Before leaving Cincinnati, the decedent, on August 4, 1928, executed his last will and testament, in which, after providing for the payment of his debts and the disposition of his household goods, he bequeathed and devised one-third of the rest and residue of his estate to The Provident Savings Bank and Trust Co., in trust, with direction that the entire income of the trust should be paid to his wife, should she survive him. Upon her death, the corpus of the trust was made distributable by the trustee in accordance with the last will of the wife; or should she die intestate, the corpus was directed to be distributed in like manner as the rest and residue of the testator Kroger's estate.

The will provided that should the testator's wife elect to take under the statutes, "then and in that event," she should have out of his estate only such amount as may be provided by the statutes.

The residuary clause [item 11 of the will] constituted as beneficiaries his children living at the time of his death, the issue of any deceased child to take *per stirpes* the interest of a deceased parent.

B. H. Kroger lived more than ten years after his second marriage. He did not die until July 21, 1938, at which time he was over 78 years old. He led an active life up to a short time before his death.

From the circumstances that at the time he created the trusts of February 13, 1928, the decedent was in good health and was motivated neither by concern for his health nor by a purpose to avoid income or estate taxes it does not follow that the finding of the tax court that he created the trusts for the purpose of barring his wife from any statutory rights in the property transferred to the trustees must be ignored.

their children; and that the Tax Court found that the trust of January 21, 1928, was created by the decedent to relieve himself from further personal appeals for financial aid by the beneficiaries, who were his relatives by consanguinity or affinity, toward whose support he had from time to time contributed. Moreover, none of the income from this trust was payable to the donor, nor did he retain any reversionary interest in the corpus or retain power of revocation.

It has been thoroughly understood since *United States v. Wells*, 283 U. S. 102, that a transfer may be "in contemplation of death" within the meaning of revenue acts even though not induced by a fear that death is "near at hand." It is sufficient if contemplation of death is the inducing cause or dominant purpose of the transfer whether or not death is believed to be near. If the thought of death is the controlling motive prompting the disposition of property, the transfer is properly held to be made in contemplation of death.

In each case an issue of fact is raised. *Colorado Bank v. Comm'r*, 305 U. S. 23, 26. The crucial fact in the instant case has been resolved upon substantial evidence against the insistence of appellants. Cf. *McCaughn, Collector of Internal Revenue, v. Real Estate Land Title & Trust Co., et al., Executors*, 297 U. S. 606, 608. The tax court found as a fact from the evidence which has been reviewed that underlying the creation of the trusts and the transfers of the twelve million dollars of treasury notes to the trustees was the "dominant motive" of the decedent to bar his future wife from any statutory rights of dower which she might have in his estate, "if she should survive him," and that "he could reasonably expect that she would for she was much younger than he was." It was soundly reasoned that inasmuch as the evidence showed that the decedent, not desiring his future wife to share with his children in the bulk of his fortune, was, when he created the trusts, contemplating his death. It may be assumed that he knew that if he survived his wife, the estate distributable to his heirs would not be diminished by the marriage.

We are not impressed with the hypertechnical argument of appellants based on distinction between the dower rights and other marital rights of the wife. The tax tribunal evidently used the phrase "statutory rights of dower" in a broad sense to embrace all rights, both real and personal which a wife has in her husband's property under Ohio law.

From the fact that the decedent originally proposed to enter into an antenuptial agreement with his prospective wife, the inference is logical that from the beginning his intention was to bar her from all property rights upon his death, except such as should be incorporated into the marriage settlement agreement. In his will executed only a few months after the transfers in trust of February 13, 1928, the decedent recognized his wife's statutory rights of dower in all of his property which he had not transferred. Apparently, it was his purpose by these

transfers to shut off his intended wife from statutory dower rights *only* in the property transferred and *not* in his remaining property.

That the decedent desired the "bulk" of his estate "to go" not to his wife-to-be but to his own children and grandchildren is uncontroverted. He had this in mind when considering the execution of a prenuptial agreement. Evidently, he was thinking of what his wife would receive at his death rather than of what she might obtain by divorce. No strength inheres in the argument that the decedent's mere contemplation of marriage establishes for the transfers a life motive associated with marriage rather than a motive to prevent his proposed marriage from interfering with the devolution of the bulk of his property to his children and grandchildren at his death.

In making the gifts of a million dollars to each of his children, the decedent was clearly motivated by a desire to confer these benefits on them *during his lifetime*. In marked contrast, his children and grandchildren could receive no benefit during his lifetime from the properties transferred in trust; for he reserved to himself, for life, the income from the trust estate.

As was said in *United States v. Wells*, 283 U. S. 102, 116, 117, the dominant purpose of the statute "is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax." Chief Justice Hughes made it clear that the question of whether a transfer is within contemplation of death depends upon the state of mind of the donor. Death is "contemplated" if the motive which induces the transfer is of the sort which leads to testamentary disposition.

After the Commissioner of Internal Revenue has found that transfers in trust were made in contemplation of death, the taxpayer carries in the courts the burden of proving that the transfers were not so made. *Wickwire v. Reinecke*, 275 U. S. 101, 48 S. Ct. 43, 72 L. Ed. 184; *McGrew's Estate v. Commissioner of Internal Revenue*, 135 F. (2d) 158, 160 (C. C. A. 6), and cases there cited; *First Trust & Deposit Co. v. Shaughnessy*, 134 F. (2d) 940, 941 (C. C. A. 2). The tax court has found that this burden was carried successfully by appellants with respect to the absolute gifts by the decedent, on January 31, 1928, of one million dollars to each of his six children and with respect to the transfers in trust of January 21, 1928. See footnote 1, *supra*. But the tax court agreed with the Commissioner in his finding that the transfers in trust by the indentures of February 13, 1928, were made in contemplation of death. The rationalization of

the tax court revealed the discriminating care with which the differentiation was made.

After careful search of the record in fulfilment of our responsibility as declared in *Thal v. Commissioner of Internal Revenue*, 142 F. (2d) 874, 875 (C. C. A. 6), we have reached the conclusion that the tax court's findings rest upon solid, substantial factual ground. The findings of fact of the tax court being supported by substantial evidence, review in this court is limited to the question whether the decision of the tax court was arbitrary or erroneous as a matter of law. *Updike v. Commissioner of Internal Revenue*, 88 F. (2d) 807, 812 (C. C. A. 8). No arbitrary or erroneous application of law by the tax court has been revealed.

True it is, as pointed out by appellants, that this court in *Capitol-Barg Dry Cleaning Co. v. Commissioner of Internal Revenue*, 131 F. (2d) 712, 715 (C. C. A. 6), held that convincing testimony before the board of tax appeals may not be arbitrarily disregarded. We adhere to the doctrine. The decision of the tax court, being deemed "contrary to the indisputable character of the evidence," was reversed. But the facts of that case bear no remote similarity to those found here.

All other authorities stressed by counsel for appellants have been thoughtfully studied. In the light of the opinion of the Supreme Court in *Dobson v. Commissioner*, *supra*, it seems probable that the reversal of the decisions of the board of tax appeals (now the tax court) by circuit courts of appeal in the cases cited below would not now be upheld on certiorari. *Lippincott v. Commissioner of Internal Revenue*, 72 F. (2d) 788 (C. C. A. 3); *Denniston v. Commissioner of Internal Revenue*, 106 F. (2d) 925 (C. C. A. 3); *McGregor v. Commissioner of Internal Revenue*, 82 F. (2d) 948 (C. C. A. 1). With reference to *Kaufman v. Reinecke*, 68 F. (2d) 642, 646, et seq., we find ourselves in accord with the dissenting opinion of Judge Evans.

Appellants insist that "alternatively, if the transfers in question were made in contemplation of death, only to the extent of the interest in the property then transferred, namely, .69565, is the value of the property, at date of death, includible in gross estate."

The argument is rejected by the plain language of the statute, which provides that "the value of the gross estate of the decedent shall be determined by including the value *at the time of his death* [italics supplied] of all property, real or personal, tangible or intangible, wherever situated— . . . (c) To the extent of any interest



therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of . . . his death. . . ."

In *Milliken v. United States*, 283 U. S. 15, 22, the Supreme Court asserted that Congress had adopted the well-understood system of taxation of transfers of property at death already in force in 42 states; and that a characteristic feature of the system was the imposition of a tax on gifts made in contemplation of death, "computed at the same value and rate as though the property given had been a part of the donor's estate passing at death." The contention of appellants is gainsaid by the principles of other Supreme Court decisions. In *Helvering v. Hallock*, 309 U. S. 106, 111, it was said with reference to section 302(c) of the Revenue Act: "The taxable event is a transfer inter vivos. But the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment." Cf. *Central Hanover Bank Co. v. Kelly*, 319 U. S. 94, 98. See also *Ingleheart v. Commissioner*, 77 F. (2d) 704, 711 (C. C. A. 5).

No relevance is found in *Robinette v. Helvering*, 318 U. S. 184, stressed by appellants. The question there was whether there was a taxable gift of the remainders created in a trust instrument. The gift tax, not the estate tax, was involved in the controversy. The Supreme Court rejected the contention of the taxpayer that, inasmuch as at the time the trust was created there were no eligible remaindermen, there had been no taxable gift. The case furnishes no support to appellants' argument.

The decision of the Tax Court is affirmed.

United States
Circuit Court of Appeals

For the Ninth Circuit. 2

JOHN LUHRING and MARGARET MORRIS,
as joint tenants,

Appellants,

vs.

UNIVERSAL PICTURES COMPANY, INC.,
a corporation,

Appellee.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 366

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division

FILED

OCT 21 1942

No. 10014

United States
Circuit Court of Appeals

For the Ninth Circuit.

JOHN LUHRING and MARGARET MORRIS,
as joint tenants,

Appellants,

vs.

UNIVERSAL PICTURES COMPANY, INC.,
a corporation,

Appellee.

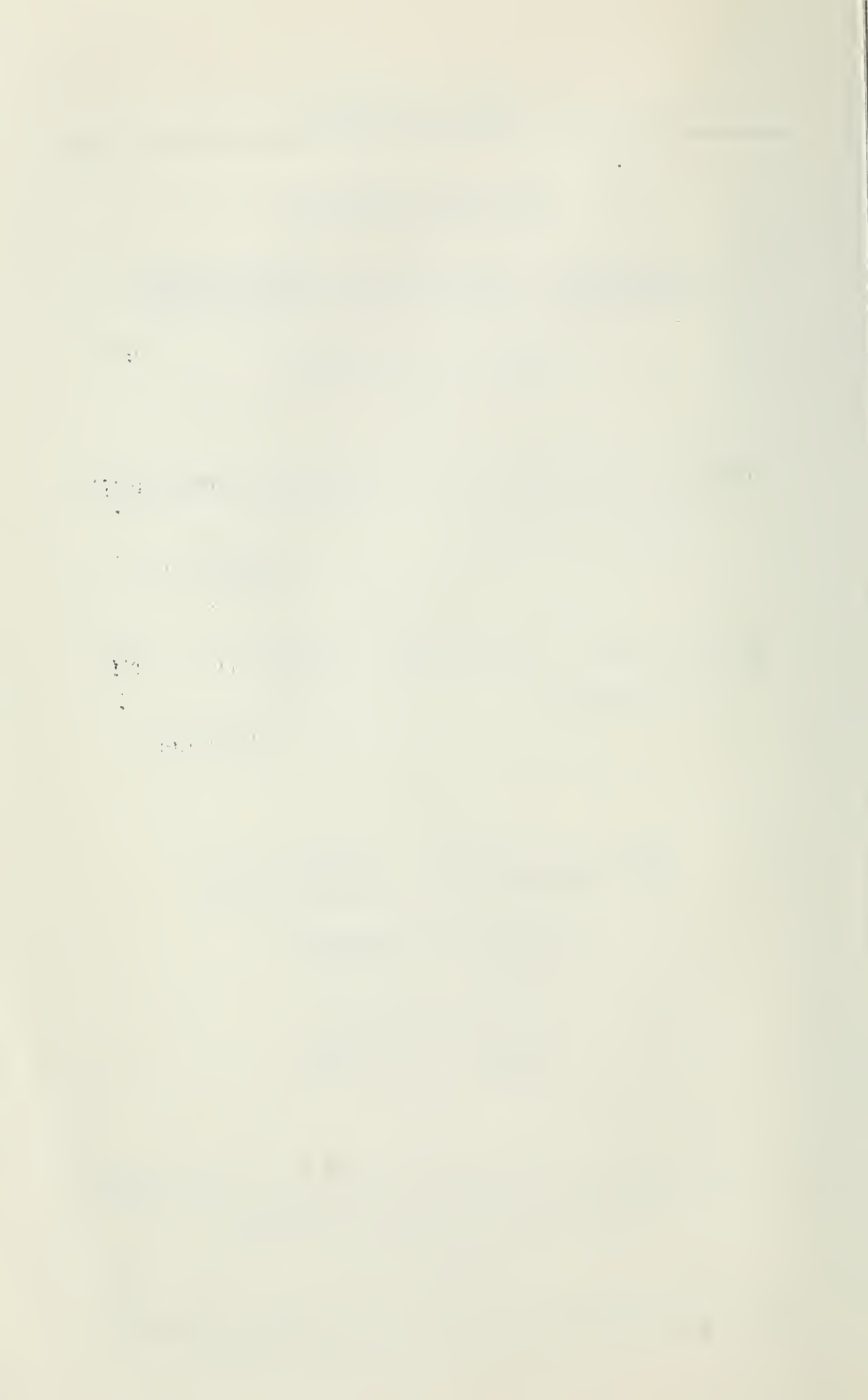
Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 366

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division



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1215 Bankers Building,
629 South Hill Street,
Los Angeles, California.

For Appellee:

MESSRS. LOEB & LOEB,
HERMAN F. SELVIN, Esq.,
610 Pacific Mutual Building,
523 West Sixth Street,
Los Angeles, California. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the Superior Court of the State of California
In and For the County of Los Angeles

No. 411053

JOHN LUHRING and MARGARET MORRIS,
as joint tenants,

Plaintiffs,

vs.

UNIVERSAL PICTURES CORPORATION, a
corporation; UNIVERSAL PICTURES
COMPANY, INC., a corporation,
Defendants.

AMENDED COMPLAINT

Comes now the plaintiffs, and as a matter of course, and for cause of action against the above named defendants, complain and allege as follows, to-wit:

I.

Plaintiffs are citizens of the United States and residents of the City of Los Angeles, County of Los Angeles, State of California. That defendant, Universal Pictures Corporation, is a corporation organized and existing under and by virtue of the laws of the State of New York, having and maintaining a place of business in the State of California, to-wit, in the County of Los Angeles, State of California. That the defendant, Universal Pictures Company, Inc., a corporation organized and existing under and by virtue of the laws of the State of Dela-

ware, and has and maintains a place of business and is doing business in the State of California, to wit, in the County of Los Angeles, State of California.

II.

That at all times herein mentioned, the Superior Court in Berlin, Germany, also known as the Landgericht was and is a court of general jurisdiction and is a court of record, duly created and organized under and by virtue of the laws of the Republic of Germany.

That at all times herein mentioned, the District Court of [9] Appeal in Berlin, Germany, also known as Kammergericht, was and is a court of general jurisdiction and a court of record, duly created, and organized under and by virtue of the laws of the Republic of Germany, and the Supreme Court of Germany, at Leipzig, Germany, also known as the Reichsgericht, was and is at all times herein mentioned, a court of appellate jurisdiction and is a court of record, duly created and organized under and by virtue of the laws of the Republic of Germany.

III.

That on or about March 4, 1930, a judgment was rendered in said Landgericht, in an action entitled, "May Film Corporation, represented by its directors, Joe May and Manfred Liebenau", vs. defendant, Universal Pictures Corporation, represented by its attorneys, Counsellor Justice, Dr. Rosenberger, Dr. Richard Frankfurter, and Dr. Gerhard

Frankfurter, which said action is numbered with the number of the case given under the German laws, as follows: 74.0.590.26/70, which said judgment provided, among other things, that said plaintiff should recover nothing and that defendant take nothing by its cross-complaint.

That thereafter plaintiff appealed from the judgment of said Landgericht to the court of proper appellate jurisdiction, towit, the Kammergericht.

That said appeal received the number allotted to cases under the laws of Germany, being No. 25.U.5849/30
74.0.590/26

and that in said action the May Film Corporation, described therein under its German name, to wit: May Film Aktiengesellschaft, was in liquidation and was represented by its liquidator, Attorney Dr. Alexander Meier, whose attorney was Dr. Paul Dienstag. That the defendant, Universal Pictures Corporation was represented by its board of directors, President Carl Laemmle, Vice President Robert H. Cochrane, Secretary Helen E. Hughes, Treasurer E. H. Goldstein, and said defendant's counsel was attorney Dr. Sarre. [10]

That on July 27, 1932 said Kammergericht, or court of appellate jurisdiction, rendered its decision, which judgment provided, among other things, that the defendant, Universal Pictures Corporation, is ordered to pay to the plaintiff, 50,000 German Reichsmarks, with interest at the rate of two per cent above the discount rate of the German Reichs

Bank, and that said interest should commence July 1, 1926.

That thereafter, both plaintiff and defendant, Universal Pictures Corporation, appealed from said judgment of said Kammergericht in an action in the nature of a request for a revision, in which the May Film Corporation was represented by its liquidator, whose attorney was Dr. Fuchlocher, and the defendant, Universal Pictures Corporation, was represented by its board of directors, whose attorney was Attorney Counsellor of Justice Dr. Schrömbgens. That said Reichsgericht rendered its judgment on February 3, 1933, which provided, among other things, that the appeal and the joint appeal against the judgment of the Kammergericht were denied, and that the judgment of said Kammergericht as hereinbefore set out, was affirmed, and thereupon said judgment became final.

IV.

That a dispute arise between the liquidator of the May Film Corporation and its president, Joe May, as to who was the owner of and entitled to the proceeds of said judgment. That as a result of said dispute, an action was commenced in the Landgericht in Berlin, Germany, in a case in which the Bank for Foreign Commerce, a corporation under its German name of Bank Für Auswärtigen Handel Aktiengesellschaft, was plaintiff, represented by its counsel, attorneys Dr. Friedrich Kempner, Heinz Pinner and Joachim Beutner; that the de-

fendant was the May Film Corporation in liquidation, under its German name as hereinbefore set out, represented by its liquidator, Kurt Hausdorff, whose [11] attorney was Dr. John A. Fagg. That on or about February 25, 1935, said court rendered its judgment, providing, among other things, as follows: that the claim asserted in the case of May Film Corporation vs. defendant, Universal Pictures Corporation, herein, No. 74.0.590.26 of the Landgericht in Berlin in the amount of 50,000 German Marks, with interest, was and is the property of Joe May and not of the May Film Corporation in liquidation, and that therefore the assignment (hereinafter more particularly set out) made by Joe May to said Bank for Foreign Commerce is legally valid. That said judgment has become and now is final under the German law.

V.

That the assignment from said Joe May to the Bank for Foreign Commerce, immediately hereinbefore referred to, is as follows:

On February 9, 1935, in Berlin, German., the May Film Corporation borrowed a sum of money from the aforesaid bank for Foreign Commerce, in which said transaction, Joe May and one Fritz Mandl signed a contract of guaranty and as a part of said transaction, said Joe May assigned the judgment of the District Court of Appeal. That subsequently thereto said Fritz Mandl caused the said claim of the Bank for Foreign Commerce to be paid, and

according to the laws of the Republic of Germany, when a guarantor pays an obligation and a judgment has theretofore been assigned to the creditor as security for the payment of said debt, said judgment is re-assigned by operation of law, to said paying guarantor, and thereupon becomes a property of said guarantor. That under the said German law, when said Fritz Mandl paid the claim or obligation of Joe May to said Bank for Foreign Commerce, said Fritz Mandl became the owner of the judgment against defendant, Universal Pictures Corporation, hereinbefore referred to. That said Fritz Mandl did pay said obligation and thereupon became the owner [12] of said judgment. That notice of the payment of the obligation of said Joe May together with the assignment from said Bank for Foreign Commerce of said judgment to said Fritz Mandl was given to the defendant in a letter dated February 25, 1936, and mailed to the defendant, Universal Pictures Corporation, on said date by said Bank for Foreign Commerce.

That thereafter said Fritz Mandl did for valuable consideration, sell, transfer and assign the judgment against defendant, Universal Pictures Corporation, hereinbefore described, to the Union Bank and Trust Co. of Los Angeles, and said bank subsequently and prior to the commencement of this action, did sell and assign said judgment to the plaintiffs herein.

That said judgment against defendant, Universal Pictures Corporation, hereinbefore referred to,

is a final judgment against defendant, Universal Pictures Corporation, and due demand has been made upon the said defendant for the payment of said judgment and no part thereof has been paid, and the whole thereof, including interest from the 1st day of July, 1936, is now due, owing and unpaid from the defendant, Universal Pictures Corporation, to the plaintiffs.

VI.

That the discount rates of the German Reichs Bank have varied since the 1st day of July, 1926, to the present, and may vary from time to time and be changed, even after this suit is filed. That for the convenience of the Court, plaintiffs have computed the interest on the claim according to the judgment, up to the 1st day of January, 1937, and that said interest amounts to 38,142.48 German Reichs Marks. That the plaintiffs will ask leave of court at the time of trial to insert in this complaint by interlineation, the total interest to said date. That the judgment in the sum of 50,000 German Reichs Marks, plus the interest thereon, according to said judgment, to the 1st day [13] of January, 1937, is the total sum of 88,142.48 German Reichs Marks. That the value of 88,142.48 German Reichs Marks in lawful money of the United States is the sum of \$35,256.99.

VII.

That plaintiffs are informed and believe and basing this allegation upon such information and belief, allege that shortly prior to the commencement of this action, defendant, Universal Pictures Corporation, was dissolved under and by virtue of the laws of the State of New York, and that defendant, Universal Pictures Company, Inc., assumed and agreed to pay any and all of the obligations of the defendant, Universal Pictures Corporation; and plaintiffs allege that this obligation sued upon herein is an obligation of the type that was and is assumed by said defendant, Universal Pictures Company, Inc., and that by reason thereof, the defendants, and each of them, are indebted to plaintiffs for the amounts prayed for herein.

Wherefore, Plaintiffs pray judgment against the defendants, and each of them, for the sum of \$35,-256.99, plus interest on the 50,000 German Reichs Marks at the rate of two per cent above the discount rate of the German Reichs Bank from the 1st day of January, 1937, together with costs of suit incurred herein, and for such other and further relief as to the court may seem just and equitable in the premises.

ELLIS I. HIRSCHFELD and

RATZER, BRIDGE & GEBHARDT

By ELLIS I. HIRSCHFELD,

Attorneys for plaintiffs [14]

(Duly Verified.)

[Endorsed]: Filed Feb. 23, 1937. [15]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL
TO FEDERAL COURT

The verified petition of Universal Pictures Company, Inc., a corporation, respectfully shows:

I

At the commencement of the within action and at all times material herein, defendant Universal Pictures Company, Inc. was and it now is a corporation duly organized and existing under and by virtue of the laws of the state of Delaware and duly authorized to transact and transacting business in the state of California. By reason of the foregoing facts said defendant at all times material herein has been and now is a citizen of the state of Delaware.

II.

At all times during the period of its existence defendant Universal Pictures Corporation was a corporation duly organized and existing under and by virtue of the laws of the state of New York and by reason of said fact said corporation at all times during the period of its existence was a citizen of the state of New York. Prior to the commencement of the within action said corporation was dissolved by proceedings duly and regularly had in said state of New York. [16]

III

Defendant Universal Pictures Company, Inc. is informed and believes, and therefore alleges, that at the commencement of the within action and at all times material herein, plaintiffs John Luhring and Margaret Morris, were and now are, and each of them was and now is, citizens of the state of

California residing within the Southern United States District in said state. By reason of the foregoing facts the within cause is one wholly between citizens of different states.

IV

The matter in controversy herein, exclusive of interest and costs, exceeds in value the sum of \$3,000, said matter being the right of the plaintiffs to recover the sum of \$35,256.99 from defendants upon an alleged judgment rendered against defendants in Germany.

V

The within cause is one of which the United States District Court is given original jurisdiction in that it is a cause wholly between citizens of different states in which the matter in controversy exceeds in value the sum of \$3,000.

Wherefore, defendant Universal Pictures Company, Inc. respectfully prays that the within cause be transferred and removed to the United States District Court for the Southern District of California, Central Division, and that all further proceedings herein be stayed.

Dated: March 4, 1937.

LOEB, WALKER AND LOEB,
Attorneys for defendant Universal Pictures
Company, Inc. [17]

(Duly verified.)

Received copy of the within Petition this 4th day of March, 1937.

ELLIS I. HIRSCHFELD,
Attorneys for plaintiffs.

[Endorsed]: Filed Mar. 4, 1937. [18]

[Title of Superior Court and Cause.]

BOND ON REMOVAL

That Universal Pictures Company, Inc., a corporation, as principal, and Fidelity and Deposit Company of Maryland a corporation organized and existing under and by virtue of the laws of the state of Maryland, and authorized to transact business under the laws of the state of California, as surety, are held and truly bound unto John Luhring and Margaret Morris, plaintiffs in the above-entitled action, their successors or assigns, in the sum of \$500, lawful money of the United States of America, for the payment of which well and truly to be made, we bind ourselves, our successors and assigns, as the case may be, jointly and severally, firmly by these presents.

The condition of the above obligation is such that Whereas, Universal Pictures Company, Inc., a corporation, one of the defendants in the above action, has applied or is about to apply, by petition to the Superior Court of the State of California in and for the County of Los Angeles, for the removal of a certain cause therein pending, wherein said John Luhring and Margaret Morris are plaintiffs and said Universal Pictures Company, Inc. is one of the defendants, to the United States District Court for the Southern District of California, Central Division, for further [19] proceedings, on the grounds in said petition set forth, and for the stay of all further proceedings, in said action,

Now, Therefore, if the above-named defendant shall within thirty days from and after the date of the filing of said petition, enter in said United States District Court a truly certified copy of the record in the above-entitled action, and shall pay or cause to be paid all costs that may be awarded therein by the said United States District Court if such Court shall hold that such suit is wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and effect.

Dated, this 4th day of March, 1937.

UNIVERSAL PICTURES
COMPANY, INC.,

By (Signed) EDWARD MUHL

Assistant Secretary
FIDELITY AND DEPOSIT
COMPANY OF MARYLAND

By W. H. CANTWELL

Its Attorney-in-fact.

Attest:

(Company Seal) S. M. SMITH

Agent

State of California

County of Los Angeles—ss.

On this 4th day of March, 1937, before me, Theresa Fitzgibbons, a Notary Public in and for the County and State aforesaid, duly commissioned and sworn, personally appeared W. H. Cantwell and S. M. Smith, known to me to be the persons

whose names are subscribed to the foregoing instrument as the Attorney-in-Fact and Agent respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as Principal and their own names as Attorney-in-Fact and Agent, respectively.

[Seal]

THERESA FITZGIBBONS

Notary Public in and for the State of California,
County of Los Angeles.

My Commission expires May 3, 1938.

Status of Company and Authority of Agent Good
for Bond of \$500.00.

KURTZ KAUFFMAN

Court Commissioner

March 4, 1937.

Bond Approved Mar. 10, 1937.

ROBERT W. KENNY

Judge

Received copy of the within Bond this 4 day of
March, 1937.

ELLIS I. HIRSCHFELD

Attorneys for plaintiffs.

[Endorsed]: Filed Mar. 4, 1937. [20]

[Title of Superior Court and Cause.]

NOTICE OF FILING OF PETITION FOR
REMOVAL AND BOND AND OF MOTION
TO REMOVE

To Plaintiffs Above-Named and to Their Attorneys
of Record:

You and Each of You Will Please Take Notice that defendant Universal Pictures Company, Inc. will this day file in the within court its petition for removal of the within action to the United States District Court for the Southern District of California, Central Division, and its bond in connection therewith.

You and each of you are further notified that on Wednesday, March 10, 1937, at the hour of ten o'clock a. m., or as soon thereafter as counsel may be heard, said defendant will move the above-entitled court in Department 35 thereof, for an order of said court transferring and removing the within action to the said United States District Court, and staying all further proceedings herein.

Said motion will be made upon the ground that the within action is wholly between citizens of different states and is one of which the United States District Courts are given original jurisdiction.

Said motion will be based upon this notice of motion, upon said petition for removal, and upon all of the files and [21] records herein.

Dated: March 4, 1937.

LOEB, WALKER AND LOEB.
By HERMAN F. SELVIN,
Attorneys for defendant Uni-
versal Pictures Company,
Inc.

Received copy of the within Notice this 4 day
of March, 1937.

ELLIS I. HIRSCHFELD,
Attorneys for plaintiff.

[Endorsed]: Filed Mar. 4, 1937. [22]

[Title of Superior Court and Cause.]

ORDER FOR REMOVAL TO FEDERAL
COURT AND STAY OF PROCEEDINGS

This matter having come on regularly to be heard in Department 35 of the above-entitled court, upon the petition of defendant Universal Pictures Company, Inc., and it appearing that the within cause is wholly between citizens of different states, that the matter in controversy exceeds in value the sum of \$3,000, and that the action is one of which the United States District Court is given jurisdiction, and that defendant Universal Pictures Company, Inc. has duly petitioned for removal thereof to the United States District Court for the Southern District of California, Central Division, and has filed a good and sufficient bond in connection therewith,

Now, Therefore, It Is Ordered that the within action be and it hereby is transferred and removed to the United States District Court for the Southern District of California, Central Division.

It Is Further Ordered that all proceedings herein in the within court be and they hereby are stayed.

Dated: March 10th, 1937.

ROBERT W. KENNY,
Judge.

O. K.

K. D. L.

(Kenny)

[Endorsed]: Filed Mar. 10, 1937. [23]

CERTIFICATE OF CLERK TO RECORD
ON REMOVAL

State of California,
County of Los Angeles—ss.

No. 411053

I, L. E. Lampton, County Clerk and ex-officio Clerk of the Superior Court in and for the County and State aforesaid, do hereby certify the foregoing copies of documents and orders consisting of Complaint, Summons, Amended Complaint, Stipulation, Notice of Filing Petition for Removal, Petition for Removal, Bond on Removal, Minute Order of March 10, 1937 granting petition for removal and Formal Order of Removal to the United

States District Court for the Southern District of California (Central Division) in the action of John Luhring et al vs. Universal Pictures Corporation, a corp., to be full, true and correct copies of all of the original documents on file and/or of record in this office in said action to date.

In Witness Whereof, I have heerunto set my hand and affixed the seal of the Superior Court this 26th day of March, 1937.

[Court Seal] L. E. LAMPTON,
County Clerk.
By E. GERST,
Deputy.

[Endorsed]: Filed Apr. 2, 1937. [24]

In the United States District Court
Southern District of California
Central Division

No. 7962-J

JOHN LUHRING and MARGARET MORRIS,
as joint tenants,

Plaintiffs,

vs.

UNIVERSAL PICTURES CORPORATION, a
corporation, UNIVERSAL PICTURES COM-
PANY, INC., a corporation,

Defendants.

AMENDED ANSWER

Defendant Universal Pictures Company, Inc., for
itself alone, answers the amended complaint on file
herein, as follows:

I.

Answering paragraph I of said amended com-
plaint answering defendant admits that it is a cor-
poration duly organized and existing under and by
virtue of the laws of the State of Delaware and that
it maintains a place of business and is doing business
in the county of Los Angeles, state of California.
In this connection answering defendant alleges that
it is duly authorized to transact such business in said
state. Answering defendant further admits that at
all times during the period of its existence Universal

Pictures Corporation was a corporation duly organized and existing under and by virtue of the laws of the state of New York, authorized to transact and transacting business in the state of California. Prior to the commencement of the within action said defendant was dissolved by proceedings duly and regularly had in said state of New York, since which time said defendant has not transacted, and is not now transacting any business whatever. [25]

II.

Answering defendant admits the allegations contained in paragraph II of said amended complaint. In that connection answering defendant is informed and believes and therefore alleges that under and by virtue of the laws of the Republic of Germany, as they existed at all times material herein, it was necessary, in order for any of the courts mentioned in said paragraph II to have or acquire jurisdiction of the person of a defendant in any action commenced or pending therein, that process of said court be duly and regularly served upon such defendant or that such defendant voluntarily appear and submit to the jurisdiction of the court, and if the defendant be a corporation, that the person or persons upon whom process is served and who make or purport to make an appearance on behalf of the defendant be duly and regularly authorized by the defendant so to do.

III.

Answering the allegations contained in paragraph III of said amended complaint defendant denies that Universal Pictures Corporation was represented, in the action referred to in said paragraph, by its attorneys or by any person or persons authorized to appear for or represent said Universal Pictures Corporation in said action; or that said Universal Pictures Corporation was represented by its board of directors, or by President Carl Laemmle or Vice-President Robert H. Cochrane or Secretary Helen E. Hughes or Treasurer E. H. Goldstein, or by any person or persons whatsoever authorized to represent or appear for it. Save and except as hereinabove directly denied, answering defendant has no information or belief sufficient to enable it to answer the allegations contained in said paragraph III, and therefore, and placing its denial upon that ground, denies generally and specifically each and every allegation contained in said paragraph III. [26]

IV.

Answering defendant has no information or belief sufficient to enable it to answer the allegations contained in paragraphs IV, V and VI of said amended complaint, and therefore, and placing its denial upon that ground, denies generally and specifically each and every allegation contained in said paragraphs, or in any or either of them. In this connection answering defendant alleges that if the actions and proceedings referred to in said paragraphs were

had or taken, neither answering defendant nor defendant Universal Pictures Corporation was a party thereto, had any knowledge thereof, or was given any notice thereof, by reason whereof said actions and proceedings, if had or taken, were not, and are not, binding in any way upon answering defendant.

V.

Answering paragraph VII of said amended complaint answering defendant admits that prior to the commencement of the within action Universal Pictures Corporation was dissolved under and by virtue of the laws of the state of New York, and that answering defendant assumed and agreed to pay all just and valid obligations of said Universal Pictures Corporation, subject, however, to all defenses, equities, set-offs and counterclaims that might be or have been available to said Universal Pictures Corporation. Save and except as hereinabove expressly admitted answering defendant denies generally and specifically each and every allegation contained in said paragraph VII.

For a Further, Separate and Affirmative Defense, Answering Defendant Alleges:

I.

Answering defendant is informed and believes and therefore alleges that at all times material herein it was and [27] is the law of the Republic of Germany that before any court of record of said

country has or obtains jurisdiction of the person of any defendant in an action pending in such court it is necessary that process of said court be served, if such defendant is a corporation, upon some person duly and regularly authorized and designated by said corporation as its agent for the receipt and service of process, or that such defendant voluntarily appear in such action by some person or persons duly and regularly authorized by such defendant so to do.

II.

At no time has defendant Universal Pictures Corporation done or transacted any business in the Republic of Germany, or authorized or designated any person as its agent or representative to accept or receive service of process or to appear for or on its behalf in any action, commenced or pending in any court of said country.

III.

No process of any court of the Republic of Germany referred to in the amended complaint on file herein was ever served on any authorized or designated agent or representative of said Universal Pictures Corporation in or in connection with any of the actions referred to in said amended complaint, nor was any person appearing or purporting to appear for said Universal Pictures Corporation in any of said actions ever authorized so to do; and any such appearance or appearances as may have been made were, and each of them was, made without the

knowledge, consent or authority of said Universal Pictures Corporation.

IV.

By reason of the foregoing facts the court or courts purportedly rendering the judgments referred to in said amended complaint never had or acquired jurisdiction of the person of said Universal Pictures Corporation, and said judgments are and at all [28] times have been, and each of them is and at all times has been, void and of no force or effect.

For a Further, Separate and Second Affirmative Defense, Answering Defendant Alleges:

I.

Answering defendant is informed and believes and therefore alleges, that at all times material herein it was and is provided by the laws of the Republic of Germany that any person having obtained a judgment for the payment of money against another might enforce and satisfy said judgment by causing an order or writ of execution to be issued by the Amstergericht (which was and is a duly and regularly constituted court of record of the Republic of Germany) and levied upon the property and assets of the judgment debtor; and that when such property or assets consisted of a debt owing from a third person to the judgment debtor (including debts evidenced by a

judgment in favor of such judgment debtor against such third person) such assets might be levied upon and seized by causing an order or writ of attachment and assignment to be issued by said Amstergericht and served upon said third person. Answering defendant is further informed and believes and therefore alleges that at all times material herein it was and is provided by the laws of the Republic of Germany that said Amstergericht in issuing such order of attachment and assignment should provide and order therein that the third person owing such debt must not make payment thereof to the judgment debtor, that the judgment debtor must not dispose of said debt or collect the same, and that said debt should be forthwith assigned to the attaching or judgment creditor. Answering defendant is further informed and believes and therefore alleges that at all times material herein it was and is [29] provided by the laws of the Republic of Germany that upon the issuance of such an order of attachment and assignment and the service thereof upon a third person owing a debt to the judgment debtor, said third person is and becomes enjoined and prohibited from paying said debt to anyone other than the attaching or judgment creditor, said judgment debtor is and becomes enjoined and prohibited from disposing of or collecting said debt, and said debt is forthwith and by operation of law assigned and transferred to the attaching or judgment creditor.

II.

On or about December 5, 1935 one Universum-Film Aktiengesellschaft, a German corporation, (hereinafter referred to as U F A) by proceedings duly and regularly had and taken in the Landgericht (which was and is a regularly constituted court of record of the Republic of Germany) recovered and caused to be entered a judgment of said court against May-Film Aktiengesellschaft (which was and is the same corporation referred to by that name in the complaint on file herein) under and by virtue of the terms of which said judgment said May-Film Aktiengesellschaft was ordered to pay to said U F A the sum of 81,045.01 Reichmarks, together with interest. Thereafter on or about April 6, 1936, by proceedings duly and regularly had and taken in the Kammergericht (which was and is a regularly constituted court of appeal of said Republic of Germany) said judgment was affirmed. Ever since said last mentioned date said judgment has been and now is final and in full force and effect.

III.

On or about June 16, 1936, by proceedings duly and regularly had in the Amstergericht (which was and is a duly and regularly constituted court of record of the Republic of Germany, having jurisdiction of matters of execution and attachment) in a matter to which said U F A and said May-Film Aktiengesellschaft [30] were parties and in which

matter both of said parties duly and regularly appeared, an order of attachment and assignment was duly and regularly entered and ever since has been and is now in full force and effect. Under and by virtue of the terms of said order of attachment and assignment the claim of said May-Film Aktiengesellschaft against defendant Universal Pictures Corporation arising out of the alleged judgment against said defendant referred to in the amended complaint of file herein, was attached, said Universal Pictures Corporation was ordered not to make payment thereof to said May-Film Aktiengesellschaft, said May-Film Aktiengesellschaft was ordered not to dispose of, or collect, the said claim or judgment, and said alleged claim or judgment was assigned to U F A. Said order of attachment and assignment was duly and regularly served upon Universal Pictures Corporation prior to the commencement of the within action.

IV.

Answering defendant is informed and believes and therefore alleges that at all of the times and proceedings hereinabove in paragraphs II and III of this affirmative defense referred to, and until the service of said order of attachment and assignment, said May-Film Aktiengesellschaft was and remained the owner of the alleged judgment against Universal Pictures Corporation referred to in the amended complaint on file herein.

V.

Answering defendant is informed and believes and therefore alleges that at all times material herein it was and is provided by the laws of the Republic of Germany that the assignee or transferee of any debt or chose in action (including debts or choses in actions evidenced by judgments thereon) takes and holds the same subject to all defenses, equities, set-offs and attachments which the debtor had against the assignor or transferor. [31]

For a Further, Separate and Third Affirmative Defense, Answering Defendant Alleges:

I.

Answering defendant is informed and believes and therefore alleges that at all times material herein it was and is the law of the Republic of Germany that the courts of said Republic were not required to recognize or enforce, and need not recognize or enforce, a valid judgment of a court of the United States, but that, when any such judgment was sought to be enforced in a court of the Republic of Germany the court might and should inquire into the merits of the matter in respect of which such judgment was rendered and determine whether or not such judgment should be recognized and enforced conformably to its determination upon the merits.

II.

By reason of the foregoing facts answering defendant alleges that the within court is not required,

as a matter of comity or otherwise, to recognize or enforce the foreign judgment herein sought to be enforced, but may and should inquire into the merits of the matter in respect of which said foreign judgment was allegedly rendered.

III.

In this connection answering defendant alleges that neither it nor Universal Pictures Corporation has ever been, or is now, indebted to May-Film Aktiengesellschaft or to Joe May, in any sum whatsoever.

Wherefore, answering defendant prays judgment that plaintiffs take nothing by reason of their amended complaint on file herein, that the same be dismissed on the merits with said [32] defendant's costs incurred herein, and for such other and further relief as to the court may seem proper.

LOEB, WALKER AND LOEB,

By HERMAN F. SELVIN,

Attorneys for answering defendant. [33]

State of California,
County of Los Angeles—ss.

EDWARD MUHL

being by me first duly sworn, deposes and says: that he is an officer, to wit: Assistant Treasurer of Universal Pictures Company, Inc., a corporation, answering defendant in the above entitled action;

that he has read the foregoing amended answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true. Affiant further states that he is authorized to make and makes this affidavit for and on behalf of said defendant corporation.

EDWARD MUHL

Subscribed and sworn to before me this 4th day of November, 1937.

[Notarial Seal]

JOHN S. LAWTON,

Notary Public in and for the
County of Los Angeles,
State of California.

My Commission Expires June 29, 1941.

[Endorsed]: Filed Nov. 6, 1937. [34]

At a stated term, to wit: The February Term, A. D. 1938, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 17th day of May in the year of our Lord one thousand nine hundred and thirty-eight.

Present:

The Honorable Wm. P. James, District Judge.

No. 7962-J Law

[Title of Cause.]

The plaintiffs have demurred to the amended answer of defendant Universal Pictures Company, Inc., on various grounds and have moved to strike out portions of said amended answer. The Court determines that said demurrer should be overruled, and the motion to strike denied. This ruling is to apply to all matters alleged in the said amended answer except the separate and third affirmative defense. The Court now reconsiders the former ruling affecting that defense, and concludes that prima facie validity must be ascribed to the German judgment if it is shown that it was rendered with jurisdiction and was not procured through fraud. The third affirmative defense might require practically a retrial of the facts upon which the German judgment is predicated, and the Court is not of the opinion that such a procedure is warranted in view of the general law and particularly the provisions of Sections 1915, 1916, and 1917 of the California Code of Civil Procedure. It is therefore ordered that as to the third affirmative defense as alleged the demurrer of plaintiffs should be and it is sustained on the ground that such matters referred to do not constitute a legal defense to the cause of action alleged by the plaintiffs. An exception is

noted in favor of all parties affected by this order. [35]

[Title of District Court and Cause.]

MEMORANDUM DECISION AND
MINUTE ORDER

By the Amended Complaint, recovery is sought on a foreign judgment obtained on July 27, 1932, by May Film Corporation, in Germany, against the defendant for the sum of fifty thousand reichmarks. Title in plaintiffs is claimed through (1) a declaratory judgment of a German Court, dated February 1, 1935, in an action between the liquidator of May Film Corporation and Joe May, which declared Joe May to be the owner of the claim in the main action, and (2) an assignment of this judgment to a German bank as security for a loan and a guaranty of the same by one Fritz Mandl, who, by paying the debt, became, through operation of law, the assignee of the judgment. Mandl assigned to Union Bank and Trust Company of Los Angeles, who assigned to plaintiffs.

The last two assignments not being questioned, the problem calls for the determination of two questions only.

The first is: What effect is to be given to the declaratory judgment?

The contention that this judgment was one in rem or declaratory of a status and, as such, bind-

ing on persons not parties to it cannot be sustained, on the basis of either German or American law. [36]

It is a personal judgment, and not binding on the May Film Corporation.

Nor can it be given effect as "an introductory fact to a link" in the chain of plaintiff's title.

The cases which declare that a judgment determining title may be so used in a subsequent action against others who were not parties to the first action, but who claim adversely to the title, do not apply.

In such cases, the judgment is offered merely as one of a series of facts on the determination of which the controversy depends. Here, the existence of the judgment in the main action and its non-satisfaction being undisputed, the declaratory judgment becomes the proof of the ultimate fact in the litigation.

It is the whole measure of the plaintiffs' ownership—the foundation of their title. Without it, plaintiffs' predecessor in interest, Joe May, is not a creditor of the defendant entitled to the proceeds of the judgment in the main action. And, unless it can be shown that title to the original judgment against the defendant passed from May Film Corporation to Joe May, plaintiffs have no title.

Again, the defendant here is not in the position of an adverse claimant against whom it is sought to offer in evidence a judgment in an action to which it was not a party. What is attempted here is to bind the defendant by a judgment in an action to

which it was not a party and which declared Joe May to be the owner of a judgment against it, in contradiction of a prior judgment, on the same issue, in the main action, in which it was a party, and of which Joe May, as assignee pending suit, had notice.

This, in effect, is not merely to give evidentiary value to and to receive the declaratory judgment as a link in a chain of title at the behest of one claiming a superior title against one claiming adversely to the title. But it is, in reality, to give to it binding effect on the defendant, who is challenging the [37] *the* right of one claiming to be its judgment creditor under the judgment of a court in a case to which it was not a party.

This cannot be done under the law.

The other question is: What rights were acquired in the judgment by Fritz Mandl through the guaranty he gave to the Bank of Foreign Commerce of a debt of May Film Corporation, as security for which Joe May assigned the judgment in the main action?

The measure of Mandl's rights is the bank's letter to the defendant, dated February 25, 1936. This letter states Mandl's rights as those of one who has become an assignee by operation of law only. Plaintiffs treated it as such in their Complaint. Nowhere in the bank's letter, or in the Complaint, is it claimed, that the transaction was an actual assignment or an equitable assignment.

The instrument relied on by the plaintiffs as a source of the rights they claim through Mandl, not disclosing an assignment by operation of law, the plaintiffs have failed in this respect, also, to meet the burden of proving that they are the assignees of the original judgment obtained in Germany by May Film Corporation against the defendant, the amount of which it is sought to recover here.

Hence the following order:

The above entitled cause coming on to be heard before the court, without a jury, upon the issues raised by the Complaint and the Answer, and evidence, oral and documentary, having been introduced, and the cause having been submitted to the court for decision, and the court, having considered the evidence and the law and the arguments, oral and written, of counsel, now finds in favor of the defendant and orders judgment ordering and decreeing that plaintiffs take nothing by their Complaint against the defendant and that the defendant have judgment against the plaintiffs for its costs. [38]

Findings and judgment to be presented by the defendant under Local Rule 8, in accordance with conclusions herein given as grounds for decision.

Dated this 2nd day of November, 1940.

LEON R. YANKWICH,

United States District Judge.

Counsel notified.

[Endorsed]: Filed Nov. 2, 1940. [39]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled cause coming on to be heard before the Court without a jury upon the issues raised by the amended complaint of the plaintiffs and the amended answer of defendant Universal Pictures Company, Inc., and evidence, oral and documentary, having been submitted to the court for its decision, and the court having considered the evidence and the law and arguments, oral and written, of counsel, and the cause having been dismissed as to defendant Universal Pictures Corporation, now makes its Findings of Fact and Conclusions of Law herein as follows: [40]

Findings of Fact

I.

Plaintiffs at all times material herein were and now are citizens of the state of California residing within said state and within the Southern District thereof. Defendant Universal Pictures Company, Inc. at all times material herein was and is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, authorized to transact and transacting business in the State of California and a citizen of the State of Delaware. The matter in controversy herein exceeds in value the sum of \$3,000, exclusive of interest and costs.

II.

Defendant Universal Pictures Corporation at all times prior to its dissolution (which dissolution occurred prior to the commencement of the within action) was a corporation duly organized and existing under and by virtue of the laws of the state of New York and a citizen of said state. Prior to said dissolution defendant Universal Pictures Company, Inc. succeeded to all the property, assets and business of defendant Universal Pictures Corporation and assumed all of the latter's just and valid obligations, subject, however, to all defenses, equities, set-offs and counterclaims that might be or have been available to Universal Pictures Corporation.

III.

On or about July 27, 1932 the Kammergericht, which was a court of record of the German Reich having jurisdiction of the parties and subject-matter, rendered its judgment, in an action therein pending in which May Film A. G., a German corporation, was plaintiff and Universal Pictures Corporation was [41] defendant, condemning the defendant therein to pay to the plaintiff therein the sum of 50,000 Reichsmarks, together with interest at the rate of two percent above the discount rate of the German Reichsbank from July 1, 1926. Said judgment was affirmed on February 3, 1933 by the Reichsgericht, the Supreme Court of the German Reich, which Supreme Court had appellate juris-

diction of the cause. Said judgment became final upon said affirmance and has been final ever since. Under and by virtue of the law of the German Reich said judgment, and the claim on which it was based, were and at all times since have remained, the property of May Film A. G.; and in the German Reich and by virtue of the law of that country said judgment at all times since its rendition has been and is now enforceable against the judgment debtor, or its successor, only by May Film A. G., the judgment creditor.

IV.

On or about February 25, 1935 the Landegericht which was at the time a court of record of the German Reich, rendered a declaratory judgment, in an action in which the Bank For Foreign Commerce (Bank fur Auswartigen Handel A. G.), a German corporation, was plaintiff and May Film A. G. represented by its liquidator was defendant, declaring that the claim asserted in the action hereinabove in Finding III referred to was the personal property of one Joe May and not of May Film A. G. and that therefore, the assignment of said claim to said Bank for Foreign Commerce by said Joe May was legally valid. Neither Universal Pictures Company, Inc. nor Universal Pictures Corporation was a party to said action of Bank for Foreign Commerce v. May Film A. G., or had or was given any notice or knowledge thereof. Under

and by virtue of the law of the German Reich said declaratory judgment was in no way binding or conclusive upon either of the defendants herein, had no effect upon their [42] or either of their rights in respect of the claim referred to in said judgment or in respect of the ownership of said claim, and was and is not evidence as against either of the defendants herein of any of the facts or issues determined or purported to be determined therein.

V.

Under and by virtue of the law of the German Reich said Joe May (the asserted predecessor in interest of plaintiffs herein) did not acquire or succeed to the ownership of any part of the judgment rendered in the action hereinabove in Finding III referred to, or to any part of the claim upon which said judgment was based. In that connection the Court finds that the facts, as the result of which said acquisition or succession is claimed to have resulted, were and are insufficient to have the effect, under the law of the German Reich, of transferring to or vesting in said Joe May any part of said judgment or of the claim upon which it is based.

VI.

As part of its findings of fact made and entered in the action hereinabove in Finding III referred to, the Kammergericht found that the claim asserted in said action by the plaintiff therein had not been

transferred to or acquired by Joe May, which said finding, under and by virtue of the law of the German Reich, was and is a conclusive determination of that issue as between Universal Pictures Corporation and its successors on the one hand and May Film A. G. and its successors or claimed successors on the other.

VII.

Under and by virtue of the law of the German Reich none of the transactions had between or among said Joe May, Bank [43] for Foreign Commerce and one Fritz Mandl had the effect of transferring to or vesting in said Fritz Mandl any part of the judgment hereinabove in Finding III referred to or of the claim upon which it was based, even if at the time of said transactions said Bank for Foreign Commerce acquired or was vested with ownership of said judgment or claim. In that connection the Court finds that the facts, as the result of which it is claimed Fritz Mandl did acquire or succeed to said judgment or claim, did not have the effect, under the law of the German Reich of transferring to or vesting in said Fritz Mandl any part of the right, title or interest of said Bank for Foreign Commerce, if any, in or to said judgment of claim.

VIII.

No finding is made with respect to the issues raised by defendant's first or second affirmative

defenses for the reason that the findings heretofore made render unnecessary any findings on, or determination of, such issues; and no finding is made with respect to the issues raised by defendant's third affirmative defense, for the reason that prior to the trial hereof plaintiff's demurrer to said defense was sustained without leave to amend.

Conclusions of Law

1. Neither plaintiffs nor their alleged predecessors in interest (other than May Film A. G.) had or have any right, title or interest in or to any part of the judgment here sued upon or in or to any part of the claim upon which said judgment was based.

2. Plaintiffs are not entitled to enforce said judgment. [44]

3. Defendant is entitled to judgment that plaintiffs take nothing of or from defendants herein, or either of them, and that defendant Universal Pictures Company, Inc. have and recover of and from plaintiffs and each of them its costs incurred herein, including amounts paid or advanced to the official reporter.

Let Judgment be entered accordingly.

Dated: November 22, 1940.

LEON R. YANKWICH,
District Judge.

Not Approved as to form as provided in Rule 8.
Reason: Incomplete, incorrect and not in accordance
with the decision. Request Hearing.

ELLIS I. HIRSCHFELD,
RATZER, BRIDGE &
GEBHARDT,
SAMUEL W. BLUM,
By ELLIS I. HIRSCHFELD,
Attorneys for plaintiffs.

[Endorsed]: Filed Nov. 22, 1940. [45]

In the District Court of the United States
Southern District of California
Central Division

No. 7962-Y

JOHN LUHRING and MARGARET MORRIS,
as joint tenants,

Plaintiffs,

vs.

UNIVERSAL PICTURES CORPORATION, a
corporation; and UNIVERSAL PICTURES
COMPANY, INC., a corporation,
Defendants.

JUDGMENT

The above-entitled cause coming on to be heard
before the Court without a jury upon the issues

raised by the amended complaint of the plaintiffs and the amended answer of defendant Universal Pictures Company, Inc., and evidence, oral and documentary, having been submitted to the Court for its decision, and the Court having considered the evidence and the law and arguments, oral and written, of counsel, and the cause having been dismissed as to defendant Universal Pictures Corporation, and the Court having made its Findings of Fact and Conclusions of Law herein, Now, Therefore,

It Is Ordered, Adjudged and Decreed that plaintiffs [46] take nothing of or from defendants, or either of them, by reason of their said amended complaint; and

It Is Further Ordered, Adjudged and Decreed that defendant Universal Pictures Company, Inc. have and recover of and from plaintiffs, and each of them, its costs incurred herein, including amounts paid or advanced to the official reporter herein, which said costs are hereby taxed in the sum of \$80.50.

Dated: November 22, 1940.

LEON R. YANKWICH,
District Judge.

[Endorsed]: Filed and Entered Nov. 22, 1940.

[47]

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

(Petition for Re-Hearing)

To the Honorable Leon R. Yankwich, Judge Presiding:

Comes now the plaintiffs in the above entitled cause and move this Court for an Order vacating and setting aside the decision and judgment heretofore rendered and entered herein, in favor of the defendant, Universal Pictures Company, Inc., and against the plaintiffs, and for an order granting to plaintiffs a new trial in the above entitled cause, upon the following grounds and for the following reasons:

(1) That the decision and judgment is contrary to the law in the case.

(2) That the decision and judgment is contrary to the evidence in the case.

(3) That the decision and judgment is contrary to both law and the evidence in the case.

(4) That the evidence in the case is insufficient to justify the decision and judgment.

(5) That the evidence in the case is insufficient to support the decision and judgment in the case.

(6) Errors in law occurring at the trial, apparent upon the face of the record, prejudicial to the plaintiffs, and [50] excepted to by the said plaintiffs.

(7) Newly discovered and material evidence, discovered since the trial which could not have been

obtained and produced on the trial, by the exercise of reasonable diligence.

(8) Accident and surprise which could not have been guarded against by ordinary prudence.

(9) That the evidence in the case shows that the decision and judgment should have been rendered in favor of the plaintiffs and against the defendant, Universal Pictures Company, Inc., and that the decision and judgment as entered herein is contrary to law.

(10) The Court upon the trial of the said cause, admitted improper evidence adduced by the defendant.

(11) The Court upon the trial refused to admit proper evidence offered by the plaintiffs.

(12) The Court improperly admitted evidence offered by the defendant, over objection, to the effect that the declaratory judgment of the Landgericht, dated February 1, 1935, in an action between the liquidator of May Film Corporation and the Bank for Foreign Commerce, wherein it was adjudged that Joe May, and not May Film Corporation was the owner of the judgment sued upon herein, and that Joe May's assignment to the said bank was valid, in the opinion of the witnesses produced by said defendant, was erroneous under German law and inoperative as an adjudication that the ownership of the judgment in question was in Joe May, because, said witnesses contended that the facts showing the ownership of said judgment in Joe May were, in the opinion of the said wit-

nesses, insufficient under German law to transfer the claim and judgment to Joe May. This opinion evidence was improperly admitted for the reason that the declaratory judgment admittedly was valid, binding and conclusive and final between the parties thereto, and defendant herein was not claiming title or ownership in the [51] judgment in question adverse to any party to that action, or adverse to any predecessor or successor of any party thereto, and said opinion evidence therefore, was not admissible to impeach a judgment determining ownership between the only two claimants to said judgment who were parties to the action, and who admittedly are conclusively bound thereby.

(13) The Court after receiving the opinion evidence as to the force and effect of the aforesaid declaratory judgment from the witnesses of the defendant, improperly refused to allow and admit proper evidence offered by the plaintiffs, tending to show that in fact there was a sale and assignment of the claim and judgment in question from May Film Corporation to Joe May, and that at said time, May Film Corporation had no creditors.

(14) The Court erred in holding that the aforementioned declaratory judgment constituted no evidence in this cause in favor the plaintiffs or against the defendant, solely upon the ground that the defendant herein was not a party thereto, in that the said declaratory judgment admittedly was rendered by a court of competent jurisdiction, having juris-

diction of the persons and subject matter, and was binding, conclusive and final as to the parties thereto, and since the ownership of the claim and judgment in question was in dispute only between the parties thereto, and since defendant herein was not or has not claimed any title in and to the said judgment adverse to the plaintiffs herein, or any of plaintiffs' predecessors, said judgment under the law *constituted* evidence in favor of the plaintiffs and against the defendant, to the extent that the May Film Corporation was not the owner of the judgment, that Joe May was the owner of the judgment, and that Joe May's assignment to the Bank for Foreign Commerce was valid, and the opinion evidence offered by the defendant to the legal effect of said judgment based upon hypothetical questions, was incompetent [52] and insufficient to overcome or impeach the direct adjudication as to the ownership between the only two parties claiming the same.

(15) The Court erred in admitting over objection, opinion evidence on the part of the defendant as to the written law of Germany, in that the written law of a Foreign Country is only proved by the same or copy thereof, or by the books containing the same, and cannot be proved by the oral opinion testimony of witnesses as to the written law.

(16) The Court erred in holding that there was no assignment from the Bank for Foreign Commerce to Fritz Mandl by operation of law, in that,

under 774 of the German Civil Code, the said claim and judgment was transferred to Fritz Mandl by operation of law, upon his payment to the said bank of the claim for which the said judgment and claim was given as security.

(17) The Court erred in holding that plaintiffs could only prove an assignment by operation of law from the Bank for Foreign Commerce to Fritz Mandl, when the evidence showed that there was in addition thereto, an actual assignment, and that the issue as to the actual assignment was created by the evidence without any objection on behalf of the defendant. Issues created by the evidence as just as much a part of this case to be determined, as issues created by the pleadings.

(18) The Court erred in holding that only the German law was applicable to the assignment between the Bank for Foreign Commerce and Fritz Mandl, in that the Court has stated in its opinion that the measure of Mandl's rights is the bank's letter to the defendant, dated February 25, 1936, and since the evidence shows that this letter was received by the defendant in New York, the force and effect of that letter is to be determined by the place wherein the defendant received notice, to-wit: New York, and under such circumstances, the force and effect of said letter *was* an assignment was to be determined by the law of New York, and under the law [53] of New York, the letter constituted a legal assignment. In New York, a direction by the creditor to his debtor to pay a third person the

debt owing, constitutes an assignment of the said debt.

(19) The Court erred in holding that under section 409 of the German Civil Code, the aforesaid letter and the acts in reference thereto, did not constitute an assignment of the claim and judgment sued upon.

(20) The Court erred in further holding that since the plaintiffs did not plead anything but an assignment by operation by law in respect to the assignment from the Bank for Foreign Commerce to Fritz Mandl, that no other form of assignment could be proved, in that the issue as to the actual assignment was created by the evidence without objection, and that under the new Federal Rules, great liberality is given in respect to the pleadings, and that the case should in fact be tried upon its merits irrespective of the form or the sufficiency of the pleadings.

(21) The Court further erred in holding that the judgment sued upon and the claim on which it is based were at all times, since the rendition of the judgment sued upon, the property of May Film A. G., in that under the German law and under and by virtue of a final judgment rendered by a German Court of competent jurisdiction between the parties thereto, it was conclusively adjudicated as between the two and only claimants to the said claim and judgment that the same belonged to Joe May and not to the May Film A. G., and that no competent

evidence was offered or admitted in this cause to overcome said adjudication.

(22) The Court erred in holding and finding that the judgment in question since its rendition, has been and now is enforceable against the defendant only by the May Film A. G., in that May Film A. G. no longer was or is the owner of said judgment or claim upon which it is based, and that the same was transferred from the May Film A. G. to Joe May; firstly, by purchase and assignment, [54] and most certainly by the aforementioned declaratory judgment thereafter assigned by Joe May to the Bank for Foreign Commerce, and by the Bank for Foreign Commerce to Fritz Mandl, and by Fritz Mandl to Union Bank and Trust Co., and by the Union Bank and Trust Co. to the plaintiffs.

(23) The Court further erred in holding and finding that under and by virtue of the law of the German Reich, the said declaratory judgment had no effect upon the rights of the defendant herein in respect to the claim referred to in the judgment, or in respect to the ownership of the claim, and was not and is not evidence against either of the defendants herein of any of the facts or issues determined or purported to be determined therein, in that the said declaratory judgment under German law was admittedly binding and conclusive between the parties, and under the law of this State, admissible in evidence as a monument of title on behalf of the plaintiffs, and constitutes *prima facie*

evidence on behalf of the plaintiffs and against the defendant, since the defendant was not claiming ownership of the claim and judgment sued upon adverse to the plaintiffs, or any of plaintiffs' predecessors, and said defendant offered no competent evidence overcoming the adjudication of said judgment, and since by reason of the judgment, May Film A. G. could not and cannot claim ownership in and to the claim and judgment sued upon herein, Universal Pictures Company, Inc., most certainly cannot do so for and on behalf of said May Film A. G.

(24) The Court erred in holding and finding that under and by virtue of the law of the German Reich, Joe May did not acquire or succeed to the ownership of any part of the judgment sued upon herein, or to any part of the claim upon which said judgment was based, in that the aforementioned declaratory judgment admittedly, conclusively adjudicated between the May Film A. G. and Joe May, [55] the only parties claiming ownership to the said judgment and claim, that Joe May and not May Film A. G., was the owner of the claim and judgment and that any opinion evidence as to the force and effect of said judgment was and is inadmissible.

(25) The Court further erred in finding that the facts upon which it was claimed that Joe May acquired the ownership of said judgment were insufficient under German law to transfer or vest the

ownership of the judgment and the claim upon which it was based in Joe May, in that such finding was and is based upon incompetent opinion evidence and is in direct contradiction to a final judgment between the two claimants adjudicating the ownership in Joe May, to-wit, the aforementioned declaratory judgment.

(26) The Court erred in holding and finding that the Kammergericht found that the claim which is the foundation of the judgment sued upon herein was not transferred to or acquired by Joe May and that said finding was and is conclusive determination of that issue as between Universal Pictures and its successors and May Film A. G. and its successors on the other hand, in that the said Kammergericht did not in fact find that Joe May was not the owner of the said claim and that the only issue between the parties in that action, to-wit: May Film A. G. and Universal, was the issue as to whether May Film A. G. was the proper plaintiff, and that the said decision and judgment of the Kammergericht does not either under German law or under the law of California, constitute an adjudication that May Film A. G. and not Joe May in fact owned the claim, for the reason as to the rights between Joe May and May Film, A. G., the same were not adjudicated in the said Kammergericht action, since Joe May and May Film, A. G. were not adverse parties, and Universal did not claim ownership in itself, and therefore the Court could not adjudicate as between May Film and Joe May, the ownership

of the said claim, and the claimants to the ownership [56] of said claim were May Film A. G. and Joe May, and the rights as between themselves could not be litigated in an action wherein Joe May was not a party and particularly wherein Joe May and May Film A. G. were not adverse parties. Furthermore the statement in the said Kammergericht upon which the Court purports to make its finding, was and is only dictum and unnecessary to the decision, and even though the Court may construe the Kammergericht judgment as determining the ownership as of July 22, 1932, nevertheless such a finding could not constitute a conclusive finding as to the ownership of the judgment at any date thereafter, and that the declaratory judgment being conclusive between the two claimants, to-wit: May Film A. G. and Joe May, rendered at a subsequent date, would and must nullify any finding by this Court as to the issue of *res adjudicata*, for said declaratory judgment having occurred subsequent to the rendition of the Kammergericht judgment, would be equivalent to an assignment from May Film A. G. to Joe May as of the date of the rendition of the declaratory judgment, and such evidence would be *prima facie* evidence in favor of the plaintiffs and against the defendant herein as to the ownership of the judgment sued upon and the claim upon which it is based, at a date subsequent to the Kammergericht judgment.

(27) The Court further erred in holding and finding that under the laws of the German Reich,

none of the transactions between the Bank for Foreign Commerce and Fritz Mandl had the effect of transferring to or vesting in Fritz Mandl the claim and judgment sued upon herein, in that, the undisputed facts having shown that the said judgment was placed with the Bank for Foreign Commerce as security and Fritz Mandl having guaranteed the payment of the claim for which the judgment had been assigned as security, and Fritz Mandl having been called upon to pay and having paid the claim for which the judgment had been given as security, under the German [57] law, Fritz Mandl was entitled to receive by operation of law an assignment of the security as well as the debt which he was called upon to pay, and the defendant having offered no evidence showing that the facts which constitute the basis of the assignment to Fritz Mandl of the said judgment sued upon, in fact did not exist, the finding of the Court to the contrary is erroneous and contrary to the law and to the evidence.

(28) The Court erred in finding that the facts as a result of which it is claimed that Fritz Mandl acquired or succeeded to the judgment or claimed sued upon herein did not have the effect under the law of *German* of transferring to or vesting in the said Fritz Mandl any part of the right, title or interest of the said Bank for Foreign Commerce in and to the said judgment or claim, in that, under the law of the German Reich, particularly Section 774 of the German Civil Code, such facts were

sufficient under said German law to transfer the claim and judgment sued upon in its entirety to Fritz Mandl, and that the authorities cited by the defendant to the effect that it was necessary for the bank to make an actual written assignment of the said judgment and claim to Fritz Mandl, was not and is not applicable herein. Furthermore the facts in the case at bar show that under Section 409 of the German Civil Code and under and by virtue of the letter dated February 25, 1936, that there was an *actually* assignment of the said claim to Fritz Mandl.

(29) The Court erred in failing to find upon the issues raised in defendant's first and second affirmative defenses, in that it is necessary for the Court to find upon all material issues of the case, and evidence having been offered and introduced in respect to said affirmative defenses, and the Court having announced that said evidence was insufficient to support the same, the Court should have made a finding upon said affirmative defenses, [58] and each of them, in favor of the plaintiffs and against the defendant herein.

(30) The evidence in this case is insufficient to justify and/or support the decision and judgment rendered herein, but in fact is contrary thereto in the following particulars:

(a) That there is no evidence proving or tending to prove that that portion of Finding of Fact No. III to the effect that under and by virtue of the

law of the German Reich, said judgment and the claim on which it was based, were at all times since and have remained the property of May Film A. G. and in the German Reich and by virtue of the law of that Country, said judgment at all times since its rendition has been and is now enforceable against the judgment debtor, or its successors, only by the May Film A. G., the judgment creditors, in that: the evidence in this action shows that under and by virtue of the aforementioned declaratory judgment, the judgment sued upon and the claim upon which it is based, belonged to Joe May and not to May Film A. G., and the opinion testimony of the defendant's witnesses based upon *hypothetical* questions, was incompetent to impeach said judgment, and the same does not constitute any evidence upon which the aforementioned Finding can be supported, and the aforementioned Finding is in fact, contrary to the evidence in this case. Furthermore the evidence shows that under the law of Germany, the aforementioned declaratory judgment was valid, binding and conclusive upon the parties thereto, and under such German law and judgment, the judgment and claim in question belonged to Joe May and not May Film A. G. and could be enforced by the owner thereof by obtaining from the proper Court the so-called execution clause.

(b) That there is no evidence in this case *provincl* or tending to prove that that portion of

Finding No. IV to the effect that under and by virtue of the law of the German Reich, said [59] declaratory judgment had no effect upon the rights of the defendant in respect to the claim referred to in said judgment, or in respect to the ownership of said claim, and was and is not evidence as against the defendant herein, or any of the facts or issues determined or purported to be determined therein, in that, the purported evidence attempting to support such a *find* is incompetent opinion evidence attempting to show that the said judgment was erroneous as a matter of law, notwithstanding that the judgment admittedly was binding, conclusive and final as between the parties thereto, and since as the evidence shows that the defendant herein at no time claimed ownership to the judgment adverse to the plaintiffs or any of plaintiffs' predecessors, said defendant could not show that asb between the claimants to the ownership of said judgment that the said judgment was erroneous, and that is in effect what the defendant attempted to show by its opinion testimony, and the aforementioned Finding is in fact contrary to the evidence in the case, to-wit: the adjudication found in the aforementioned declaratory judgment.

(c) There is no evidence proving or tending to prove Finding No. V, reference to which is hereby respectfully made, in that, the only purported evidence offered in respect thereto by defendants is opinion evidence based upon hypothetical questions and not upon the facts in the case, and attempts

to impeach an admittedly final and conclusive judgment between the parties to the said judgment, to-wit: the only claimants as to the ownership of the judgment sued upon and the claim upon which it is based, and since said Finding is contrary to the adjudication found in the declaratory judgment, it is contrary to the evidence in this case.

(d) There is no evidence proving or tending to prove that Finding VI, reference to which is hereby respectfully made, in that no evidence whatsoever was offered by the defendant to prove or [60] tending to prove that the said judgment of the Kammergericht referred to therein was and is conclusive determination as between Universal Pictures Corporation and its successors on the one hand and May Film A. G. and its successors on the other hands, as to the ownership of the claim sued upon in said action, and the judgment itself shows that the sole issued determined by the Kammergericht affecting ownership of the claim was that the plaintiff, May Film A. G. was the proper plaintiff and did not go any further, and could and did not affect the ownership of the claim as between the claimant, Joe May and May Film A. G., for Joe May was not a party thereto, and if in any way connected with said action, was not an adverse party to May Film A. G., and in order to constitute *res adjudicata*, it would have been necessary for the Kammergericht to have Joe May and May Film A. G. adverse parties in order to determine their rights as to the ownership of the claim; it was, how-

ever, not necessary for the Kammergericht to have Joe May a party to said action in order to determine that May Film could continue with the action as the proper party plaintiff, and the evidence further shows that the said Kammergericht judgment was not conclusive and *res adjudicata* as between Joe May and May Film A. G. respecting the ownership of the judgment sued upon and the claim upon which it is based, in that the evidence shows that under the German law and by the aforementioned declaratory judgment, it was determined that the Kammergericht judgment was not *res adjudicata* as to the issue of ownership between May Film A. G. and Joe May, and that in an action wherein their respective rights were adjudicated and wherein Joe May and May Film A. G. were adverse parties, it was conclusively adjudged under German law that Joe May and not May Film A. G. was the owners of said judgment and claim; therefore the aforementioned Finding is also contrary to the evidence.

(e) There is no evidence proving or tending to prove Finding No. VII, reference to which is hereby respectfully made, in [61] that defendants offered no testimony whatsoever to refute plaintiffs' claims that the aforementioned claim and judgment was assigned to the Bank for Foreign Commerce as security for a debt of May Gilm A. G. by its owner, Joe May; that Fritz Mandl became a surety upon said obligation of Joe May and was called upon and did pay the obligation and that therefore

under the German law, Fritz Mandl was entitled to and did succeed to all the rights, including the ownership of the judgment in question, which the evidence showed to be the facts, and the evidence further showed that there was in fact an assignment from the Bank for Foreign Commerce to Fritz Mandl, and that the letter in question constituted an assignment in fact, both under German and under American law; therefore, the aforementioned Finding is also contrary to the evidence in the case.

(31) The said decision and judgment herein is contrary to law in that:

(a) The failure of this Court to hold that the aforementioned declaratory judgment constituted evidence in favor of the plaintiff and against the defendant is contrary to law, in that under the law of this State and of *German*, the aforementioned judgment was final, binding and conclusive between the parties thereto and constituted prima facie evidence in favor of the plaintiff and against the defendants herein in support of the plaintiff's foundation or chain of title.

(b) The Court's failure to hold that under the facts in the case at bar, there was an assignment by operation of law from Bank for Foreign Commerce to Fritz Mandl as provided by the German law, is contrary to law.

(c) The Court's failure to hold that there was in fact an actual assignment from Bank for Foreign Commerce to Fritz Mandl, is contrary to law, both

under the German and American law, includ- [62]
ing that of the State of New York and California.

(d) The Court's failure to hold that the Kammergericht judgment was not *res adjudicata* upon the issue of the ownership of the judgment herein and the claim upon which it is based, is contrary to both the German and American law.

(e) The Court's failure to find that the transaction had between Joe May, Bank for Foreign Commerce and Fritz Mandl, and the judgment sued upon herein or the claim upon which it was based, had the effect of transferring to or vesting in Fritz Mandl the right, title and interest in and to the said judgment or claim sued upon, is contrary to the law of Germany.

(f) The Court's failure to hold that there was in fact an actual assignment from the Bank for Foreign Commerce to Fritz Mandl is contrary to law, both of the law of Germany and of the United States.

(g) The Court's holding that the plaintiffs or any of the predecessors in interest, other than May Film A. G., have any right, title or interest in or to the judgment sued upon herein, or in or to the claim upon which said judgment is based, is contrary to law of both *German* and the United States and of this State.

(h) The Court's failure to render judgment in favor of the plaintiffs and against the defendant is contrary to law.

(32) In the event a new trial is granted herein, that plaintiffs will seek permission of the Court to amend their proceedings to allege not only an assignment by operation of law, but in fact, actual assignments from the Bank for Foreign Commerce to Fritz Mandl, and counsel for plaintiffs is informed and believes, and upon such information and belief states that plaintiffs will be able to obtain actual assignments from each and every predecessor in interest of the judgment and claimed sued upon herein.

(33) The Court erred in permitting the defendant to [63] introduce into evidence the so-called judgment between U. F. A. and May Film A. G., upon the theory that the same was foundation for a writ of attachment issued in said action against the defendant's predecessors herein, and since the evidence showed that the said writ of attachment was ineffectual for any purpose, the allegations and statements contained in said judgment, to which neither Joe May or any of the successors in interest were parties, was highly prejudicial in that said statements were made therein in respect to Joe May and his successors, which could not be refuted by the said Joe May or any of his successors, since they were not parties thereto.

(34) That by reason of the foregoing, the plaintiffs respectfully represent that it would be inequitable to permit the said decision and judgment rendered herein to stand, and respectfully pray that

said decision and judgment be reviewed, reversed, vacated and set aside, and for such other and further relief as may be just and property in the premises.

This motion will be based upon the matters herein contained, upon the minutes, records and files of said action, and upon the affidavits hereinafter to be served and filed herein, and upon the points and authorities to be served and filed herein.

Dated this 2nd day of December, 1940.

ELLIS I. HIRSCHFELD,
H. A. GEBHARDT,
SAMUEL W. BLUM,
By SAMUEL W. BLUM,
Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 2, 1940. [64]

[Title of District Court and Cause.]

State of California

County of Los Angeles—ss.

**AFFIDAVIT IN SUPPORT OF MOTION FOR
NEW TRIAL**

Ellis I. Hirschfeld, being first duly sworn on oath, deposes and says:

That he is an attorney at law, duly licensed to practice in all of the courts of the State of California, as well as the above entitled Court, and that as such attorney in the above entitled Court he appeared as attorney for the plaintiffs in the above

entitled action. That said action was based upon transactions and events which took place in Germany beginning in 1924, with subsequent litigation thereon which finally terminated shortly prior to the commencement of the above entitled action. That in said transaction there was, among other things, an assignment of a claim from the Bank of Foreign Commerce to one Fritz Mandl. That in the preparation of this case affiant associated with him one Dr. H. A. Gebhardt, for the reason that affiant was informed and believed that said Gebhardt was, in addition to being a lawyer authorized to practice in the Courts of the State of California, familiar with German law. Affiant was informed and believes that said Gebhardt was at said time and still is acting as general [65] counsel for the Los Angeles offices of the German Consulate, and because of the position that said Gebhardt occupied, affiant believed that said Gebhardt could and would furnish affiant with such law and interpretations thereof existent in Germany at the times applicable in the above entitled action. That among other things said Gebhardt advised affiant and affiant relied thereon, that under the facts and circumstances of this case, the aforesaid assignment from the Bank for Foreign Commerce to Fritz Mandl was an automatic assignment under the facts and circumstances according to German law, and was known as "an assignment by operation of law", as evidenced by Section 774 of the German Code of Law, applicable to such transactions.

Affiant further states that said Fritz Mandl had left Germany and at the time affiant had been employed in this action said Fritz Mandl was residing in Austria. That shortly thereafter Austria became a part of Germany, under such conditions as made it necessary for Mr. Mandl to leave the country. Mr. Mandl was not heard of for a long time, until it was discovered that he was in South America and was making a short trip to New York. Immediately upon ascertaining said facts, affiant established communications with said Mandl and was advised that his attorney in New York was one Mr. Leo Taub. Affiant communicated with said attorney Leo Taub and asked him to make arrangements to take the deposition of Mr. Mandl (pursuant to stipulation between counsel for defendant and affiant) and said Taub was instructed by affiant to obtain from Mandl all information respecting the subject matter of this litigation that he could. Your affiant states that he was advised and believed that the Bank for Foreign Commerce was no longer in existence in Germany and that any information that could be ordinarily obtained from a bank was no longer available, as the only evidence of the existence of said bank was the fact that its assets [66] have been sequestered by a liquidator and that none of the officers, either known or unknown, were available. Affiant further attempted to communicate with the attorneys for plaintiffs' original assignors in Germany, and upon attempting to obtain information as to the whereabouts your affiant was informed

by the sources from whom he made inquiry that because some of the lawyers were Jewish that they had not been in favor with the Government and their licenses had been cancelled and they could not be located. Two of the former attorneys were ascertained by your affiant by information furnished to him, to be dead. Your affiant therefore had no source of information during the preparation for the trial other than said Mandl; a Mr. May, who lived in Los Angeles and who was working for one of the defendants at the time and was a rather unwilling witness, particularly in view of the fact that defendants' counsel had made mention of the fact that said May appeared to be too interested in the case and that the defendant was unwise in keeping him on the payroll. Shortly after said comments, said May was no longer working for said defendant and gave further information to affiant. Other witness whom affiant attempted to gain information from was one E. H. Goldstein, who also resided in Los Angeles and who stated that he still owned shares in one of the defendant companies. The only other witness available who could give information was one Keller, who knew nothing about the bank transfer.

Upon receiving notice that the deposition of Mandl had been taken, affiant was notified by Mandl's New York attorney, said Taub, that Mr. Erich Lenk was in New York City and that Mr. Lenk was a former officer of the Bank. Thereupon, pursuant to stipulation between counsel for the

parties the deposition of Lenk was ordered taken.

As will be disclosed by the Court records, the depositions of both Mandl and Lenk did not come to Los Angeles, nor did any [67] copy thereof come to your affiant until shortly before the trial, the deposition of Mandl preceding the deposition of Lenk by a few days. All during the time between the taking of the deposition and the delivery or furnishing of the deposition to affiant, your affiant most diligently and energetically attempted to get said Taub to complete the deposition and get the same sent to Los Angeles. That delay of all kinds occurred without fault of plaintiff or affiant. That the reason for the delay is set forth in the affidavit of said Leo Taub, attached to this affidavit.

At this point affiant begs to draw the attention of the Court to affiant's opening remarks on the date the case was called for trial, which remarks in substance stated that the depositions had just arrived and that affiant had not had a chance to examine them, and further the Court will recall that one of the depositions was not even then in the files and that the clerk of the Court subsequently left the courtroom and found the deposition in a place other than in the files. Affiant further states that the Honorable Trial Court stated that the case had taken entirely too long to get to trial and that the case should have been disposed of long ago and that it was the longest pending case on the calendar and that the calendar should be cleaned up. That said

remarks of the Court were accepted by affiant as being tantamount to an order to proceed.

That affiant further states that at all times during the trial and prior thereto he was not advised by anybody, nor did he have any then known means of ascertaining whether there had ever been an actual assignment of the claim in addition to the letters and testimony that had been submitted in evidence. That shortly after the judgment of the Court had been rendered, affiant advised said May and further advised one Pinner, a German attorney who had been an attorney for the beforementioned Bank, of the judgment of this Honorable Court. It will be remembered by this Honorable Court that said Pinner's presence became first known during the trial of this action. Such statement was made to this Honorable Court at the time of trial. Affiant further states that Joe May notified Mandl that one of the reasons given by the Court for its decision was the absence of a written assignment from the Bank to Mandl. That thereafter Mr. May received a letter from Mr. Lenk advising him that the Bank had in fact, subsequent to the time the assignment by operation of law had been effected, made a written assignment of the claim and judgment involved herein to said Mandl. Thereupon your affiant immediately communicated with Mr. Taub in New York to ascertain if in fact such a written assignment had been made. That in an affidavit filed concurrently herewith, by Erich W. Lenk, Mr. Lenk

states that a written assignment of the claim and judgment involved herein was in fact made and executed by the Bank for Foreign Commerce to Fritz Mandl, the terms of which are set forth in said affidavit of said Lenk.

Affiant further states that this information as to an actual written assignment having been made was made known to affiant for the first time by said Joe May after he had received the letter from Lenk above referred to. Affiant further states that since he did not suspect or know at any time during the trial of the action or prior thereto of the existence of any written assignment as described in Lenk's affidavit, filed concurrently herewith, he could not have known or did not direct the New York attorney Lenk's deposition to develop that information in the deposition, and the reason why Lenk did not disclose the same prior thereto is disclosed in his affidavit. Affiant further states that he believes that said New York attorney, Taub, could not or should not have known of the existence of a written assignment because said Taub knew nothing about the case other than what information had been furnished by affiant. [69]

That the existence of the written assignment upon a new trial will undoubtedly produce a different result, and that affiant is informed by said Lenk, and as appears in the affidavit of said Lenk, he, said Lenk, states that if this Honorable Court will grant a new trial, or that if permission is granted

to take additional evidence, that he will appear in person and testify to the facts as set out in his affidavit.

Affiant alleges that the preparation of this particular type of case was one of extreme difficulty, due to the conditions existing in Europe and due to the spreading to all corners of the earth of the various persons who might or could have known all of the facts, and begs the Court to consider, among other things, the fact that these circumstances took place in a country undergoing dynamic and rapid changes, where attorneys were disbarred, persons addresses becoming unknown, others forced to flee the country, leaving their belongings and documents in the hands of whoever may find them. That at the time of leaving the country witnesses, including said Mandl, had personal safety on their minds, together with the worry of re-establishing themselves elsewhere, and that with all of these conditions together with time, plus the known faultiness of the memory of man, together with the lack of legal knowledge on the part of the layman, it could well be understood why Mandl would not have recalled or volunteered the information as to a written assignment. Affiant further states that the facts which have been developed by the affiants filed concurrently herewith, were not known by the plaintiffs or by the Union Bank and Trust Company of Los Angeles.

Further affiant sayeth not.

ELLIS I. HIRSCHFELD

Subscribed and sworn to before me this 2nd day
of January, 1941

(Notarial Seal) HARVEY HIRSH

Notary Public in and for the County of Los An-
geles, State of California.

[Endorsed]: Filed Jan. 2, 1941 [70]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR
NEW TRIAL

State of New York

City of New York

County of New York—ss.

Leo Taub, being duly sworn, deposes and says:

That he is an attorney and Counsellor-at-law duly
admitted to practice in the Courts of the State of
New York.

That some time during the early part of April,
1940, deponent received a stipulation authorizing
the taking of the deposition of Fritz Mandl, a wit-
ness on behalf of the plaintiffs herein, which depo-
sition was to be taken in the City and State of New
York.

Action thereupon, deponent examined the said
witness and his deposition was duly prepared and
sworn to on or about the 18th day of April, 1940,
before the Notary Public appointed by the Court
herein under the terms of the stipulation. [71]

At about that time, deponent corresponded with
the plaintiff's attorney in Los Angeles, California

regarding the taking of the deposition of another witness, Dr. Erich Lenk.

Deponent held the forwarding of the deposition of the witness, Fritz Mandl, because certain Exhibits had been marked in evidence or had been identified in connection with the deposition of Fritz Mandl and the same Exhibits were needed in the taking of the deposition of the other witness, Dr. Erich Lenk.

Subsequently thereto, deponent received a stipulation authorizing him to take the deposition of the witness, Dr. Erich Lenk.

However, the address of such Dr. Erich Lenk was not known to deponent and he thereupon communicated with Mr. Fritz Mandl who at that time had returned to Buenos Aires, Argentine, his place of residence.

At about the same time, deponent undertook several professional trips to various Central American countries including Haiti and Cuba and it was for that reason that the taking of the deposition of the witness, Dr. Erich Lenk, was delayed.

Deponent then received an urgent letter from the plaintiff's attorney which stated that the case had been set for trial within a short period of time and deponent then immediately prepared the deposition of the witness, Dr. Erich Lenk and forwarded both the Mandl and Lenk depositions, together with the Exhibits to the Court. [72]

The above stated facts are the reasons why the two depositions of Mr. Fritz Mandl and Dr. Erich

Lenk referred to herein were not sent to the Court previously.

LEO TAUB

Sworn to before me this 17th day of December, 1940.

EDWARD H. SNYDER

Notary Public Kings Co. Clk's No. 479, Reg. No. 2531 N. Y. Co. Certificates filed in Clk's No. 1320, Reg. No. 2S803.

Commission expires March 30, 1942.

No. 83212

State of New York

County of New York—ss.

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, the same being a Court of Record having by law a seal, do hereby certify, that Edward H. Snyder whose name is subscribed to the annexed deposition, certificate of acknowledgment or proof, was at the time of taking the same a Notary Public acting in and for said County, duly commissioned and sworn, and qualified to act as such; that he has filed in the Clerk's office of the County of New York a certified copy of his appointment and qualifications as a Notary Public for the County of Kings with his autograph signature; that as such Notary Public he was duly authorized by the laws of the State of New York to protest notes, to take and certify depositions, to

administer oaths and affirmations, to take affidavits and certify the acknowledgment or proof of deeds and other written instruments for lands, tenements and hereditaments, to be read in evidence or recorded in this State. And further, that I am well acquainted with the handwriting of such Notary Public, or have compared the signature of such officer with his autograph signature filed in my office, and believe that the signature to the said annexed instrument is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Court and County, this 24 day of Dec., 1940.

[Seal] ARCHIBALD R. WATSON

County Clerk and Clerk of the Supreme Court,
New York County.

[Endorsed]: Filed Jan. 2, 1941. [73]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR
NEW TRIAL

State of New York
City of New York
County of New York—ss.

Erich W. Lenk, being duly sworn, deposes and says:

That he resides at 1781 Riverside Drive, New York City.

That deponent is the same person who heretofore executed a deposition in the above entitled action.

Deponent obtained his degree of "Dr. Jur." in the City of Innsbruck, Austria, during the year 1922.

From the year 1927 and until April, 1937, deponent was connected with the "Bank duer Auswaertigen Handel, Aktiengesellschaft" in the City of Berlin, Germany. The capacities of deponent, while connected with the said bank were at different times, and successively the following:—Assistant to the secretary; Vice-President (Prokurist); Manager of the Legal and Loan Departments; Member of the Presidential Committee (Vorstandsmitglied); and finally, sole Liquidator.

During the said period of connection with the above mentioned bank, deponent was in charge of, and fully familiar with a [74] transaction which concerned Mayfilm, A. G., Joe May, Julius Aussenberg, Mrs. Mia May and Fritz Mandl.

This transaction took the following form:—In the latter part of the year 1930, the above mentioned bank granted a loan of approximately 80,000.00 to 100,000.00 R.M. to the Mayfilm A. G. in Berlin. This loan was secured by an acceptance for 100,000.00 R.M. signed by Joe May, Director of Mayfilm Corporation, and endorsed by himself, his wife, Mia May, and the other Director of the corporation, Julius Aussenberg, and a written guaranty by Fritz Mandl.

In addition, the bank, received as collateral several items of personal property, among which was

a claim held by Joe May against Universal Pictures Corp. in the United States. The major part of the loan was not paid when due and the bank exercised its rights as against the guarantor, Fritz Mandl, and charged his account with the bank, with the outstanding amount of the loan plus interest.

The loan having been satisfied, the bank transferred and assigned to Fritz Mandl all of the collateral which it held as security for the loan including the claim against Universal Pictures.

This was done in the following manner:—On the 26th day of February, 1936, I in my official capacity advised Universal pictures that by reason of Mr. Mandl's satisfaction of the obligation to the bank, he, Mr. Mandl, had become subrogated to the bank's claim against Universal Pictures Corp. This letter was sent by me on behalf of the bank and was countersigned by another officer of the bank as was customary with this type of document. (This letter is marked plaintiff's "Exhibit I")

This letter was sent to Universal to put them on notice as to the disposition of the claim pending receipt of permission to execute a written assignment. This was done to prevent Universal from paying out to any other person. It was my belief, based upon the legal [75] opinion of the bank's attorney, that Mr. Mandl succeeded automatically to the bank's interest in the claim against Universal Pictures by virtue of Par. 774 B.G.B. However, it was thought best to secure in addition, an official per-

mission of the Government's Foreign Exchange Control Office and then to execute a written assignment to Mr. Fritz Mandl.

I, personally, acting in my capacity as a member of the Presidential Committee, (Vorstandsmitglied) instructed Dr. Hans Schoene, an expert in foreign exchange matters, to apply on behalf of the Bank, to the German Foreign Exchange Control Office (Devisenstelle) at Berlin, to obtain official permission for the execution of the formal transfer and assignment to Mr. Fritz Mandl of the claim against Universal Pictures.

This permission was obtained shortly after the notice had been sent to Universal Pictures and in pursuance of such notice, I prepared the formal assignment to Mr. Mandl. This was embodied in a letter.

The following is substantially the contents of that letter to the best of my recollection:—

As collateral for our claim against the May Film A. G. Berlin, Mr. Joe May has assigned to our bank on February 9th, 1933, a claim against Universal Pictures Corp., (New York) a claim of R.M. 50,000, plus 2% interest above the discount rate of the Reich Bank.

Whereas, the said loan was not fully repaid when due, and whereas, we have invoked your guaranty for our claim against the May Film A. G. regarding the principal plus interest, and whereas you have satisfied our claim under

your guaranty, we herewith transfer and assign (with permit of the Foreign Exchange Control Office, Berlin No....., Dated.....) this claim against Universal Pictures Corp. (New York) to you.

Signed.

This letter *as* signed by me on behalf of the bank and was countersigned by another officer of the bank as was customary with this type of document and it was notarized and documentary stamps affixed. [76]

This letter contained the number and date of the permit issued by the Foreign Exchange Control Office.

My recollection of the contents of this letter is based upon the following:— The bank at all times used a form of transfer and assignment of which the foregoing is a copy. Since I know of my own knowledge that such a transfer and assignment was executed, I can readily affirm that the foregoing constitutes in substance the instrument by which the claim was transferred and assigned.

Deponent knows of his own knowledge that a copy of the written assignment which was mailed to Fritz Mandl was retained by the bank in its files but I do not know if it is still there. In view of the subsequent liquidation of the bank, it will be impossible to obtain that copy. However, I do know that such a document was in fact executed by the bank; that a copy thereof was originally retained by the bank

and that the foregoing is a true and accurate statement of the contents.

I did not testify concerning the written assignment as I was at no time asked about it upon my deposition. I merely answered questions put to me. At no time prior thereto did I have an opportunity of discussing the facts with Mr. Taub, who was himself unacquainted with the details of the transaction.

Deponent hereby expresses his willingness to appear before this Honorable Court if a new trial is granted or if permission is granted to take additional evidence, and to testify in person to the facts as stated hereinabove.

ERICH W. LENK

Sworn to before me this 28th day of December, 1940.

EDWARD H. SNYDER

Notary Public Kings Co. Clk's No. 479. Reg. No. 2531 N. Y. Co. Clk's No. 1320, Reg. No. 2S803.

Commission expires March 30, 1942.

[Endorsed]: Filed Jan. 2, 1941. [77]

[Title of District Court and Cause.]

State of California

County of Los Angeles—ss.

AFFIDAVIT OF HERMAN F. SELVIN IN OP-
POSITION TO MOTION FOR NEW TRIAL

Herman F. Selvin, being first duly sworn, deposes and says:

I am an attorney-at-law duly licensed to practice in the courts of the state of California and in the above-entitled court. I am a member of the firm of Loeb and Loeb, attorneys for defendant Universal Pictures Company, Inc. herein and as such I have been in charge of the preparation and defense of the within action. [78]

1. The real party in interest in the within litigation, that is, the person having full control of the litigation and the person to whom the proceeds thereof, if any, would be payable is Fritz Mandl, being the same Fritz Mandl referred to in the affidavits in support of motion for new trial. This statement is based upon statements made to me by Mr. Ellis I. Hirschfeld, attorney for plaintiffs, and upon correspondence addressed to the defendant in the within action by Mr. Hirschfeld, and upon my personal knowledge of the situation. In that regard it should be noted that plaintiffs are assignees of the Union Bank & Trust Co. of Los Angeles, which in turn is an assignee of Fritz Mandl. The interest of the Union Bank & Trust Co. of Los Angeles, and therefore that of the plaintiffs, was purely that of an assignee for purposes of collection, as is indi-

cated by a letter dated November 25, 1939 addressed by Mr. Hirschfeld to Mr. Edward Muhl, an employee of the defendant, in which letter the following statement appears:

“For your further information, the instructions from Mr. Mandl to the Union Bank provides (sic) simply for the payment to me of the attorney’s fees in the action in the event we are successful, and for the remitting to him of the balance.”

2. In a letter addressed to the defendant by Mr. Hirschfeld dated March 26, 1936, the following statements, among others, are made:

“This is to advise you that we, the undersigned represents Mr. Fritz Mandl who has instructed us to file this claim with you. Mr. Mandl by proper assignment is the owner of a judgment rendered July 27, 1932 by the Kammergericht (District Court of Appeal in Berlin) No. 25U5849/30, further numbered 74 ’0590/26, which judgment was affirmed [79] in the Reichsgericht (Supreme Court of Germany) on February 3, 1933, No. VII 324/1932 . . .”

It thus appears that several years prior to the trial of the within action knowledge of an assignment of the judgment to Mr. Mandl was had by the parties in interest, notwithstanding which knowledge no attempt to prove any such assignment was made at the trial of the cause, but reliance was had solely upon an alleged transfer by operation of law.

3. Under date of April 1, 1940 I entered into a stipulation with counsel for plaintiffs for the taking of the deposition of Fritz Mandl in New York. That deposition was taken on or about April 15, 1940. On or about April 16, 1940 I was requested by counsel for plaintiff to stipulate to the taking of the deposition of an additional witness in New York, and on May 1, 1940 I signed a stipulation for the taking of said deposition, it being then disclosed that the witness in question was Doctor Erich Lenk, and immediately forwarded that stipulation to counsel for plaintiffs. I have no information as to why said deposition was not taken sooner except that I do know that it was not delayed at the request of defendant or any of defendant's counsel.

4. With respect to the persons referred to in Mr. Hirschfeld's affidavit as sources of information, it should be noted that Mr. Hirschfeld was apparently in communication with Mr. Mandl several years before the trial of the action, as indicated by the correspondence above referred to and was in direct communication with him at the time of the taking of his deposition in April, 1940.

Since the pleadings in the within action raised an issue as to assignment of the claims sued upon, it is quite apparent that a simple question to Mr. Mandl would have disclosed [80] the information which it is now claimed was disclosed only after the judgment in the case had been entered.

With respect to Mr. May who is the Joe May frequently referred to in the testimony in this case,

it should be noted that Mr. May at various times during the pendency of the cause has been employed by the defendant and at no time was his employment severed by reason of Mr. May's connection with or interest in the present litigation. In fact Mr. May was actually employed by the defendant at the time the within cause was tried, notwithstanding which employment Mr. May was able to and did attend every session of court at which the case was heard and remained present in court throughout the entire session. I can and do state from my personal observation during the trial that Mr. May was frequently and almost constantly in communication with plaintiffs' attorneys in the court room during the trial of the cause. I can and do further state that notwithstanding Mr. May's employment by the defendant, Mr. May consistently refused to discuss the subject matter of the within litigation with any officer or representative of the defendant or with the defendant's attorneys, but would carry on such discussions with the plaintiffs' attorneys. From these facts it is quite evident that plaintiffs had ample opportunity, on many occasions long prior to the trial of the within cause, as well as during the trial of the within cause, to obtain from Mr. May any information or knowledge that he might have had with respect to the issues involved.

Mr. E. H. Goldstein, referred to in the affidavit of Mr. Hirschfeld, was at one time an officer of the defendant's predecessor corporation. Mr. Goldstein

was interviewed by counsel for plaintiffs and was actually placed under subpoena to appear and testify at the trial, from which attendance he was excused by plaintiff's counsel. Mr. Goldstein, in response to [81] inquiries of defendant's attorneys, stated that he had no knowledge of the matters involved in the within litigation other than a vague recollection that there was some difficulty at the time he was connected with the defendant's predecessor, over a contract in Germany.

The person Keller referred to in the affidavit of Mr. Hirschfeld is unknown to me.

5. Mr. Pinner, referred to in the affidavit of Mr. Hirschfeld, it will be recalled, was personally present at the trial of the within cause and testified as a witness on behalf of plaintiffs. He was examined on both direct and cross-examination with respect to the alleged transfer of the claim involved in the action from the Bank for Foreign Commerce to Mandl and testified at length to the practice of the Bank in such cases and to his personal connection with various phases of the transaction involved in this action. It will also be recalled that he testified that in his opinion the document relied upon by plaintiffs as evidencing a transfer by operation of law was in and of itself an assignment sufficient to transfer the claim regardless of any transfer by operation of law. It therefore appears that any information or knowledge which Mr. Pinner might have had with respect to the transaction could readily have been ascertained at a time when his tes-

timony to that effect could have been produced at the trial of the cause.

HERMAN F. SELVIN

Subscribed and sworn to before me this 6th day of January, 1941.

[Notarial Seal] ELLOWENE EVANS

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Jan. 25, 1941. [82]

[Title of District Court and Cause.]

STIPULATION AND ORDER

It is hereby stipulated by and between the plaintiffs, John Luhring and Margaret Morris, and the defendant, Universal Pictures Company, Inc., a corporation, by and through their respective counsel, as follows:

(a) That plaintiffs' motion for a new trial in the above entitled action now set for hearing on the 30th day of December, 1940, at the hour of 10:00 A. M., in the Courtroom of the Honorable Leon R. Yankwich, shall be continued to the 20th day of January, 1941, at the hour of 10:00 A. M., of said day, or as soon thereafter as counsel may be heard, without further notice or motion.

(b) That plaintiffs may have to and including the 30th [83] day of December, 1940 within which to

serve and file points and authorities in support of plaintiffs' motion for a new trial.

(c) That plaintiffs may have to and including the 30th day of December, 1940 within which to serve and file any affidavits in support of plaintiff's motion for a new trial.

(d) That pursuant to the terms of this stipulation, that the above entitled Court be and is hereby authorized to make its order in accordance herewith.

Dated, December 23, 1940.

ELLIS I. HIRSCHFELD

H. A. GEBHARDT

SAMUEL W. BLUM

By ELLIS I. HIRSCHFELD

Attorneys for plaintiffs.

LOEB AND LOEB

By HERMAN F. SELVIN

Attorneys for defendant,

Universal Pictures Com-
pany, Inc.

It is so ordered:

Dated, December 23, 1940.

LEON R. YANKWICH

Presiding Judge.

[Endorsed]: Filed Dec. 26, 1940. [84]

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME TO FILE
POINTS AND AUTHORITIES AND CON-
TINUING HEARING

It is hereby stipulated by and between the counsel for the respective parties hereto:

1. That plaintiffs' motion for a new trial in the above entitled action now set for hearing on the 20th day of January, 1941, at the hour of 10:00 a. m., in the court room of the Honorable Leon R. Yankwich, shall be continued to the 3d day of February, 1941, at the hour of 10:00 a. m., or as soon thereafter as counsel may be heard, without further notice or motion;

2. That defendant Universal Pictures Company, Inc. may have to and including January 20, 1941 within which to serve and file its memorandum of points and authorities in opposition to plaintiffs' motion for a new trial.

Dated: January 14, 1941.

ELLIS I. HIRSCHFELD

H. A. GEBHARDT

SAMUEL W. BLUM

By SAMUEL W. BLUM

Attorneys for Plaintiffs

LOEB AND LOEB

By HERMAN F. SELVIN

Attorneys for defendant

Universal Pictures Com-
pany, Inc.

So ordered.

YANKWICH, J.

[Endorsed]: Filed Jan. 16, 1941. [85]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between the parties hereto through their respective counsel that the hearing in the above entitled matter now set for February 3, 1941 before the Honorable Leon R. Yankwich, shall be continued to the 17th day of February, 1941, at the hour of 10:00 o'clock, A. M., without further notice or motion, and that the plaintiffs may have to and including the 10th day of February, 1941 within which to serve and file reply points and authorities and affidavits in support thereof, if they so desire.

Dated this 31st day of January, 1941.

ELLIS I. HIRSCHFELD

H. A. GEBHARDT

SAMUEL W. BLUM

By ELLIS I. HIRSCHFELD

Attorneys for Plaintiffs

LOEB AND LOEB

By HERMAN F. SELVIN

Attorneys for Defendant

Universal Pictures Company, Inc.

It is so ordered:

LEON R. YANKWICH

Judge of the above entitled
Court.

Dated, January 31, 1941.

[Endorsed]: Filed Jan. 31, 1941. [86]

At a stated term, to wit: The February Term, A. D. 1941, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 3rd day of February in the year of our Lord one thousand nine hundred and forty-one.

Present: The Honorable: Leon R. Yankwich, District Judge.

No. 7962-Y Civil

[Title of Cause.]

This cause coming before the Court for hearing plaintiff's motion for a new trial is now continued to February 17, 1941, for the said hearing, pursuant to stipulation and order signed January 31, 1941.

[87]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between the plaintiff and the defendant Universal Pictures Corporation, Inc., by and through their respective counsel, that plaintiff's motion for a new trial in the above entitled action, now set for the 17th day of February, 1941 at the hour of 10:00 o'clock A. M., in the courtroom and before the Honorable Leon R. Yankwich, is hereby continued to the 24th day of February, 1941 at the hour of 10:00 o'clock A. M., without further notice or motion.

Said continuance is requested on account of illness of counsel.

Dated: February 14, 1941.

ELLIS I. HIRSCHFELD

H. A. GEBHARDT

SAMUEL W. BLUM

By SAMUEL W. BLUM (G.G.)

Attorneys for Plaintiffs

LOEB AND LOEB

By HERMAN F. SELVIN

Attorneys for Defendant

Universal Pictures Company, Inc.

It is so ordered:

LEON R. YANKWICH

District Court Judge

[Endorsed]: Filed Feb. 14, 1941. [88]

At a stated term, to wit: The February Term, A. D. 1941, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 24th day of February in the year of our Lord one thousand nine hundred and forty-one.

Present: The Honorable: Leon R. Yankwich, District Judge.

No. 7962-Y Civil

[Title of Cause.]

This cause coming before the Court for hearing plaintiffs' motion for a new trial; Ellis I. Hirschfield, Esq., and Samuel W. Blum, Esq., appearing as counsel for the plaintiff; Herman F. Selvin, Esq., appearing as counsel for the defendant; and G. M. Fox, Court Reporter, being present and reporting the testimony and the proceedings:

Attorney Blum presents motion.

At 12:20 o'clock P. M. it is ordered that the cause be, and it hereby is, continued to 1:30 o'clock P. M. for further proceedings. At 1:30 o'clock P. M. court reconvenes herein, and all being present as before,

At 3:25 o'clock P. M. Attorney Selvin argues in opposition to motion; at 4:04 o'clock P. M. Attorney Blum argues in rebuttal; at 4:52 o'clock P. M. Attorney Hirschfield argues further in rebuttal; and

at 4:56 o'clock P. M. Attorney Selvin argues further. It is ordered that the cause as to the said motion be submitted. [89]

At a stated term, to wit: The February Term, A. D. 1941, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 3rd day of March in the year of our Lord one thousand nine hundred and forty-one.

Present: The Honorable: Leon R. Yankwich, District Judge.

No. 7962-Y Civil

[Title of Cause.]

This cause having been presented and argued, and submitted; and the Court having considered the arguments and the law, the motion of plaintiffs for a new trial is denied. [90]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Defendant Universal Pictures Company, Inc.,
a corporation, and to its Attorneys, Messrs.
Loeb and Loeb and Herman F. Selvin, Esq:

Notice is hereby given that John Luhring and Margaret Morris, as joint tenants, the plaintiffs

above named, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 22, 1940.

Dated: This 28 day of May, 1941.

ELLIS I. HIRSCHFELD

SAMUEL W. BLUM

By ELLIS I. HIRSCHFELD

Attorneys for Appellants John
Luhring and Margaret Mor-
ris, as joint tenants, plain-
tiffs.

1215 Bankers Building

629 South Hill Street

Los Angeles, California.

Copy mailed to Attorneys for defendants May 31, 1941.

R. S. ZIMMERMAN,

Clerk,

E. L. S.

[Endorsed]: Filed May 29, 1941. [91]

[Title of District Court and Cause.]

ORDER FOR THE TRANSFER FOR
ORIGINAL EXHIBITS

Upon reading and filing the aforementioned stipulation and good cause appearing therefor, it is hereby ordered that all original exhibits in the above

entitled matter shall be transmitted by the Clerk of the above entitled Court to the United States Circuit Court of Appeals for the Ninth Circuit, and shall be considered as part of the record upon the appeal herein.

Dated this 3rd day of July, 1941.

LEON R. YANKWICH

District Judge

[Endorsed]: Filed Jul. 3, 1941. [96]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE TRAN-
SCRIPT OF RECORD AND TO DOCKET
APPEAL

Upon reading and filing the aforementioned stipulation, and good cause appearing, it is hereby ordered that the time within which to file the transcript of record on appeal in this action and to docket the cause on appeal be and it is hereby extended to and including the 15th day of August, 1941.

Dated: this 3rd day of July, 1941.

LEON R. YANKWICH

District Judge

[Endorsed]: Filed Jul. 3, 1941. [98]

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME TO FILE
TRANSCRIPT OF RECORD AND TO
DOCKET APPEAL HEREIN, AND ORDER
THEREON

It is hereby stipulated and agreed by and between the appellants and appellees, by and through their respective counsel that the time to file the transcript of record and to docket the cause upon appeal herein shall be and hereby is extended to and including the 27th day of August, 1941, and that the above entitled Court is hereby authorized to make and enter its order in accordance herewith without further notice or motion.

Dated: This 29th day of July, 1941.

ELLIS I. HIRSCHFELD

SAMUEL W. BLUM

By SAMUEL W. BLUM

Attorneys for plaintiffs-appel-
lants, John Luhring and
Margaret Morris.

LOEB & LOEB

By HERMAN F. SELVIN

Attorneys for defendant-ap-
pellee, Universal Pictures
Company, Inc. [99]

ORDER

Upon reading and filing the aforementioned stipulation, and good cause appearing, it is hereby ordered that the time within which to file the transcript of record on appeal in this action and to docket the cause on appeal be and it is hereby extended to and including the 27th day of August, 1941.

Dated this 4th day of August, 1941.

LEON R. YANKWICH

District Judge

[Endorsed]: Filed Aug. 4, 1941. [100]

[Title of District Court and Cause.]

STIPULATION AS TO THE RECORD ON
APPEAL [101]

It is further stipulated and agreed that the affidavits in support of and in opposition to plaintiffs' motion for new trial herein were duly served and filed by the respective parties within the time allowed by law, as extended by stipulation and by leave and order of the above entitled Court and that the same were duly used upon the said Motion for New Trial and were duly considered by the Court in respect thereto, and that the various stipulations and orders in respect to the filing of the said [102] affidavits may be omitted from the record on appeal herein.

Dated: This 29th day of July, 1941.

ELLIS I. HIRSCHFELD

SAMUEL W. BLUM

By SAMUEL W. BLUM

Attorneys for plaintiffs-appel-
lants, John Luhring and
Margaret Morris

LOEB AND LOEB

By HERMAN F. SELVIN

Attorneys for defendant-ap-
pellee, Universal Pictures
Company, Inc.

[Endorsed]: Filed Aug. 13, 1941. [103]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 103 inclusive contain full, true and correct copies of Complaint; Amended Complaint; Petition for Removal; Bond on Removal; Order for Removal; Certificate of Clerk of State Court; Amended Answer of Defendant; Order Overruling and Sustaining Demurrer and Denying Motion to Strike From Answer; Memorandum Decision; Findings of Fact and Conclusions of Law;

Judgment; Notice of Motion for New Trial; Motion for New Trial; Affidavits of Ellis I. Hirschfeld, Leo Taub, Erich W. Lenk and Herman F. Selvin; Stipulations and Orders Postponing Hearing Motion for New Trial; Minutes of Hearing Motion for New Trial; Order Denying Motion for New Trial; Notice of Appeal; Stipulation Waiving Bond on Appeal and Order; Stipulation for Transmittal of Original Exhibits; Order for Transmittal of Original Exhibits; Stipulations and Orders Extending Time to File the Record and Docket Appeal, and Stipulation Designating Contents of Record on Appeal, which together with the Reporter's Transcript of Testimony and Proceedings and the Original Exhibits constitute the Record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the fees of the clerk for copying, comparing, correcting and certifying the foregoing record amount to \$17.15, which amount has been paid to me by the Appellants.

Witness my hand and the seal of the said District Court this 31st day of December, A. D. 1941.

[Seal] R. S. ZIMMERMAN,

Clerk,

By EDMUND L. SMITH,

Deputy.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS ON TRIAL.

Appearances:

ELLIS I. HIRSCHFELD, Esq.,
SAMUEL W. BLUM, Esq., and
H. A. GEBHARDT, Esq.

For Plaintiffs.

LOEB & LOEB,
By HERMAN F. SELVIN, Esq.
For Defendant. [1*]

H. A. GEBHARDT,

called as a witness on behalf of plaintiff, being first
duly sworn, testified as follows:

The Clerk: Will you please state your name?

The Witness: H. A. Gebhardt.

Direct Examination

Q. By Mr. Blum: Mr. Gebhardt, what is your
occupation?

A. I am an attorney at law; a lawyer.

Q. In the State of California? A. I am.

Q. And admitted to practice in this state?

A. I have been admitted to practice in all the
courts of this state since 1915.

Q. Are you familiar with the German language?

*Page numbering appearing at top of page of original Reporter's
Transcript.

(Testimony of H. A. Gebhardt.)

A. I am. I was born and raised in Germany, studied law in Germany, took the first bar examination and took the degree of Doctor of Laws. After the first bar examination I took the office of what we call Referendar, which is an assignment to the various judges of the courts in Germany; first, Municipal Court, then Superior Court, District Attorney and attorney, later the District Court of Appeals, and again to the Municipal Court. I stayed there three and a half years, then went to London, England, and studied English law. I came to this country in 1914 and studied American law; was admitted to the bar here in 1915. I have [4] been practicing law, with the exception of the first years during the war, since then. I have practiced law in and around Los Angeles since 1930, continuously.

Q. Are you familiar with the German language and its writings and its printings?

A. I am very familiar with it. I speak and write it thoroughly. I was in Germany last year for four months and have kept up the study of the German law.

Q. Are you able to translate documents, written or printed in German, into the English law?

A. Yes; absolutely.

Q. You have done that many times?

A. Many times, yes.

Q. Have you ever done that in any action or proceeding in the courts? A. Yes.

(Testimony of H. A. Gebhardt.)

Q. Have you ever been used as an interpreter?

A. Yes, I have, in courts.

Q. Have you ever been used as a translator——

A. Yes, I have.

Q. ——in regard to the German law?

A. Yes.

Q. Have you had any recent contact with the German law?

A. Oh, yes. I have continuous contact with the German law. I am attorney for the local German consulate and handle questions of German law continuously, and have for the last [5] ten years. When I was in Germany last year I also interested myself in law and looked up various things and brought over various books.

Q. In your contact with the German Consulate have you had occasion to familiarize yourself with the German law, the written German law?

A. I have right along. It is almost an every-day occurrence that I have some question of German law come up.

Q. And you have made a thorough study of that, have you?

A. I have. I have kept up with the study of the later German law, as well as the former German law.

Q. Are you familiar with the books which contain the German code? A. I am.

Q. And with the contents of those books?

A. I am.

(Testimony of H. A. Gebhardt.)

Q. Do you know where those books were printed?

A. They were printed in Germany mostly, naturally.

Q. Do you know what books are used in the German courts as the official books?

A. Any reputable publication on the text and the codes is used in German courts.

Q. Now, you have in your possession certain documents? A. I have.

Q. Will you state to the court generally what this document is? [6]

A. This document, your Honor, is a——

Mr. Selvin: I would like to see it.

Mr. Blum: This is just preliminary, so we can identify it.

The Court: All right.

A. This volume here contains photostatic copies of the pleadings and the three judgments rendered in this case; namely, the judgment of the Superior Court, the District Court of Appeals and the Supreme Court.

Q. By Mr. Blum: And those are the judgments which are involved in this action?

A. Yes. This is the chain of title concerning the judgment that May Film secured against——

Q. Who appears in that action as the plaintiff?

Mr. Selvin: Just a minute. I suppose we ought to let the record speak for itself after it has been properly identified.

(Testimony of H. A. Gebhardt.)

The Court: Do you want to see it?

Mr. Selvin: Yes, I would like to see it.

The Court: The document speaks for itself, because it starts out "Klage", which is "Complaint." It shows der Mayfilm Aktiengesellschaft, complainant, against somebody else.

Mr. Blum: The court speaks German, does it not?

The Court: I wouldn't answer that yes or no. My knowledge is not so excellent as it might be. At least, [7] I don't claim any knowledge of legal German. That is a science in itself. Probably to ordinary German I would answer yes. I am satisfied, however, with Dr. Gebhardt's reputation for integrity; and his thorough knowledge of the German language should not be challenged by anybody. We won't have any difficulty and won't have to check on him.

The Witness: Thank you, your Honor. [8]

Q. By Mr. Blum: Dr. Gebhardt, you made a translation of that entire file, did you not?

A. I will answer that yes, to this extent: That I translated approximately nine-tenths of it personally. As you will see, this is a very voluminous file, and I had some assistants, whose translations I checked page for page and corrected as much as I could.

Q. It was done under your direction and supervision?

(Testimony of H. A. Gebhardt.)

A. It was done under my direction and supervision, yes.

Q. And after it was completed you checked all the translation? A. That is correct.

Q. And you have that translation?

A. I have. [10]

Q. Doctor, do you know what the Landgericht is? What court is the Landgericht?

A. The Landgericht or Superior Court is a court of record, having jurisdiction in civil matters, either which exceeds the jurisdiction of the Municipal Court in value or involves real estate or other important—pardon me, not real estate—involves other important litigation. I can give you the definition of the exact jurisdiction of a superior court, which is similar to the jurisdiction of the Superior Court here, by referring to the Code of Civil Procedure, which the gentleman on the other side has with him.

Q. Is it a court of general jurisdiction?

A. It is.

Q. And its judgments there are recognized, of course, in Germany as judgments?

A. They are.

The Court: Are its judgments enrolled or recorded in the sense in which we use those phrases in English law?

A. The original judgments remain in the files of the court. The parties are given certified copies of the originals, which remain in the file of the

(Testimony of H. A. Gebhardt.)

court. You cannot get the original from the court.

The Court: And they remain there as part of the court's records? A. That is correct. [12]

The Court: And they are enrolled or entered upon the minutes of the court, also?

A. That is correct.

Q. By Mr. Blum: Is the Landgericht a court of record? A. It is.

Mr. Selvin: We don't dispute the existence and creation and jurisdiction of that court.

The Court: All right. That will save time.

Mr. Selvin: Either the Landgericht, the Kammergericht or the Reichsgericht. [13]

Mr. Blum: Would you stipulate there was a Universal Pictures Corporation of New York at the time this action was commenced?

Mr. Selvin: I will stipulate there was a New York corporation called Universal Pictures Corporation, in 1926.

Mr. Blum: At this time we offer into evidence the complaint in the action, having the English title of May [15] Film Corporation vs. Universal Pictures Corporation, New York, 730 Fifth Avenue, defendant, which are pages 1 and 2.

Q. And the exhibit is what?

A. 3 to 6, inclusive.

Q. The complaint, with the exhibit, are pages 1 to 6, inclusive? A. That is right.

Q. And the translation of the same is 1 to 6, inclusive? A. Correct.

(Testimony of H. A. Gebhardt.)

Mr. Selvin: I think it is immaterial, but I have no objection to it. I don't know why we have to go behind the judgment. It is at least *prima facie*.

Mr. Selvin: It may save considerable time, your Honor, if I say at this time that we will not offer any proof in support of the allegations of our first affirmative defense.

The Court: All right. At any rate, the translation, appearing on the pages indicated by counsel, being the six pages of Exhibit 2, will be marked Plaintiffs' Exhibit 3. [16]

Mr. Blum: And we offer the original photostatic copies, also.

Mr. Blum: At this time, your Honor, pursuant to a statement of Mr. Selvin that no objection would be made, we offer the entire transcript, which is Plaintiff's Exhibit 1 for identification, into evidence, together with the translation thereof, which is Plaintiffs' Exhibit 2 for identification, with this understanding: That as to the judgments in there, to-wit, the three judgments, the recitals therein shall be given the effect of recitals in judgments, as a matter of law. That as to the other portions of the record, to-wit, those matters are not necessarily offered for the truth of what is stated therein, but is primarily offered to show that certain proceedings [17] were before the court.

Mr. Selvin: In other words, the judgments shall have whatever effect, by the law to be applied, shall

(Testimony of H. A. Gebhardt.)

be given them; and the other matters in the file are to show what was in the German court.

Mr. Hirschfeld: Well, we offer it for whatever purpose may be competent, and counsel is restricting his objection to the matters as he stated them.

Mr. Selvin: I do object to the file going in if, for instance, the testimony of the witness shown in that trial is offered not to show that the witness so testified in Germany, but to prove the substantive facts to which he testified. That is hearsay, so far as we are concerned. But if it is offered merely to show what was before the German court, we have no objection to it. [18]

The Court: It seems to me, gentlemen, that the best thing to do is to receive the original photostatic copy as Plaintiffs' Exhibit 1. It is now Exhibit 1 for identification, isn't it?

The Clerk: Yes.

The Court: Receive the translation as Exhibit 2. And unless you want the other exhibits to remain separately they can be withdrawn. And I instruct the clerk to delete the markings of 3 and 4, because they are already included in the exhibit.

Mr. Blum: Yes, they may be deleted, because they are now included.

The Court: Exhibits 3 and 4 will be withdrawn because they have been included in Exhibits 1 and 2, which are now [19] admitted. All right, proceed.

(Testimony of H. A. Gebhardt.)

PLAINTIFF'S EXHIBIT No. 2

Certified Copy.

74. O. 590. 26/70.

In the name of the people!

Rendered

March 4, 1930.

(signed) Hulbe Court Clerk
as recorder of the Court.

In re

May Film Corporation in Berlin W. Tauentzienst.
14, represented by its Directors Joe May and
Manfred Liebenau,

Plaintiff and Crossdefendant

Represented by: Attorney Dr. Curt Ebstein, Berlin
W. 8, Behrenst. 27,

versus

Universal Pictures Corporation, New York, 730
Fifth Avenue,

Defendant and Crosscomplainant

Represented by Attorneys Counsellor of Justice Dr.
Rosenberger, Dr. Richard Frankfurter and Dr.
Gerhard Frankfurter in Berlin-Wilmersdorf,
Nikolsburger Place 2,

Department No. 17 for Commercial matters of
the Superior Court No. I in Berlin after trial on
March 4, 1930 by Presiding Judge Loeschhorn, and

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)
commercial judges Levy and Friedlaender
has adjudged:

Plaintiff's complaint and defendant's crosscomplaint are denied.

Plaintiff is to pay 5/6, defendant 1/6 of the costs of the suit.

Upon furnishing of security of 500 RM execution may be issued under this judgment.

STATEMENT OF FACTS.

Plaintiff has alleged that on May 10, 1926 in Paris it entered into the agreement with defendant copy of which is contained on pages 3 to 6 of the exhibits. That under the agreement plaintiff was to produce for the defendant the film: "The Emperor's Lustre" which the defendant acquired under certain conditions for Germany, France, Belgium and Switzerland. That in Section 12 of this agreement it was stipulated that in case of violations of this agreement the guilty party would pay to the party complying with the contract a contractual penalty not subject to judicial discretion in the amount of 50,000 Marks without prejudice to further claims for damages. That it was further agreed that non-compliance with the terms of payment entitled the plaintiff to cancel the contract with forfeiture of the payments made until then. That the claim for the contractual penalty as dam-

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

ages was not affected thereby. That there were no oral understandings besides this agreement. That changes require written form.

That the defendant did not make the payments to the plaintiff provided for in the agreement. That plaintiff cancelled the agreement on June 7, 1926 and demands in this suit payment of the contractual penalty with reservation of its rights for further damages.

That the agreement was signed for defendant by its general representative L. Burstein. That he was authorized to represent the defendant.

Plaintiff prays:

that defendant be ordered to pay to plaintiff the sum of 50,000 Reichsmarks with interest of $\frac{3}{4}\%$ per month from July 1, 1926 and that execution may issue upon furnishing of security.

Defendant has prayed

that the complaint be denied with costs to defendant, alternatively that it be allowed a stay of execution in case of adverse judgment. Defendant has filed a cross complaint with the prayer that it be adjudged that plaintiff has no further claim for damages besides the claim sued upon.

Deft denies entering into a binding agreement, alleging that Burstein had no authority to enter into it, inasmuch as his power of attorney did not extend to film production. That it was known to

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

the directors of plaintiff May, furthermore that Burstein particularly called it to their attention.

That Burstein did not intend to enter into a final agreement in the name of the defendant. That May asked him on May 9, 1926 at a meeting in Paris to make a contract with him in behalf of defendant in case the association contemplated for the exploitation of the film should not materialize. That Burstein at first declined, calling attention to his lack of power of attorney and that only upon the fervent request of May he agreed, subject to the approval of the Director General of defendant, Laemmle, to enter into the agreement, in case the association should not materialize. That thereupon May drew up the agreement and submitted the draft to Burstein. That he (Burstein) objected to some details, especially the stipulation as to the contractual penalty and stated, that he could not submit such stipulations to Laemmle. That May agreed to every change and that in his presence Burstein crossed out the provision regarding the contractual penalty.

That the agreement was not approved by Laemmle. That the association did not materialize because May prevented it purposely. That plaintiff cannot claim any rights from this condition maliciously induced by it.

That it appears from the fact that May thereafter made a contract with Phoebus-Film, Ltd. emphasiz-

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

ing, he was not bound otherwise, that plaintiff did not consider itself bound by the agreement of May 10, 1926.

Plaintiff has denied these allegations of the defendant and has prayed to deny the cross complaint.

Regarding further allegations of the parties reference is made to their pleadings read in court.

Evidence was taken according to the orders of April 27, 1927, April 17, October 2, December 14, 1928. Reference is made to the orders to take testimony and the testimony of the witnesses Burstein, Fellner, Gallizenstein, Weinert and Muehsam contained in the minutes of February 7, June 14, 1928, February 7, March 7, May 2, 1929 and January 28, 1930.

Conclusions.

(Grounds for decision)

The complaint based on the agreement of May 10, 1926 is logical, but not justified. It is true that plaintiff has proved, as was incumbent upon it, that the agreement of May 10, 1926 was entered into between the parties and that Burstein was authorized by defendant to enter into it.

Witness Burstein testified at his examinations of February 7, 1928, January 28, 1930 that at that time he was agent of the defendant in fact practically General Manager. That the character of the defendant was restricted to the sale of films, that he

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

had general power of attorney for same. That in it a transaction like the one he entered into with the plaintiff was not contemplated, that therefore defendant could "practically" have stated to him that he had to consult them regarding such a transaction. That he stated to May that he could not really do that, but that the President Laemmle in America would undoubtedly approve the matter. That he had a moral right to enter into such transactions, that he signed the agreement of May 10, 1926 in Paris. That May stated to him before he signed the contract that he could make any reasonable change desired, that he signed the agreement relying upon this promise, when "it" was the opinion that one agreed on the contents of the agreement on general lines. That he signed the contract as an entity "in grosso modo". That he was certain that he would get it through with Laemmle, but that he expressly refused to sign every single page of the agreement with his initials and that before signing he stated to May in effect that he could in fact get anything through with Laemmle, but that he had to have a conference with him first.

From this testimony it appears with certainty that Burstein intended to enter into the agreement in behalf of the defendant without reservation. His refusal to sign every page of the document with his initials is considered immaterial by the Court. Even

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

if it were customary among American businessmen to consider an agreement binding only if initialed in this manner, the omission of the signing of the single pages could not be considered in interpreting sec. 346 Commercial Code. The partner in the agreement of defendant May is not an American businessman, the agreement was entered into in Paris, lastly Burstein testified that he agreed with May regarding the consummation of the contract along general lines and that he signed it. In view of this testimony it would be against good faith and equity if the defendant would consider a contract, the contents of which were agreed upon by its representative and the plaintiff along general lines and signed by him, as not consummated because the single pages were not initialed.

From his testimony the court finds that Burstein was certainly authorized to the consummation. Even if general power of attorney issued to him did not contemplate such transactions as the one he entered into with the plaintiff, he testifies, that he was "morally" authorized to enter into the contract, and that he was certain, that the agreement would not be objected to. He further testifies that the idea that plaintiff produce films in conjunction with the defendant was unquestionably approved by Laemmle.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

The further defense of the defendant that the agreement was entered into only under the condition that the association planned originally would not materialize has not been proven by the evidence. The agreement entered into later by the plaintiff with Phoebus Film, is not adverse to the fact that a binding agreement was entered into by the parties on May 10, 1926, because the plaintiff cancelled the agreement on June 7, 1926 because of the refusal of defendant to fulfill.

In view of these findings the prayer of the cross-complaint, which is otherwise admissible, cannot be granted. The cross-complaint was therefore denied.

However the claim to payment of the contractual penalty is without right. As Burstein testified at his second examination May had granted him the right to make any reasonable change of the agreement, that the parties only agreed upon the contract as an entity along general lines. From these understandings the defendant had the right, to cross out any objectionable clauses of the agreement. It is immaterial whether this was done in presence of May in Paris, or later on. In view of the reservations by Burstein there was no meeting of the mind as to such details, which were not the fundamentals of the agreement. Plaintiff can therefore not rely on paragraph 12, as according to Civil Code sec 154,

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

155 it is to be assumed that the parties would have entered into the agreement also without the stipulation regarding the contractual penalty. Decision had therefore to be rendered as stated above. Decision regarding costs is based on sec 92 Code of Civil Procedure; regarding execution sec 710 id.

signed Loeschhorn

also for Commercial judge Levy (on vacation) and commercial judge Friedlaender who is absent.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Dr. Paul Dienstag

Attorney at the District

Court of Appeal & Notary

Berlin W. 57, Buelow St. 22

At Elevated Station Buelow St.

Telephone Luetzow 8242 & 8243

Berlin April 16th, 1930.

District Court of Appeal &

District attorney D. C. o. A.

April 17th, 1930

Appeal

In re

May-Film Corporation at Berlin W,

Tauenzienst. 14, now: Koch St. 6/7, represented by
its members of the Board of Directors Joe May and
Manfred Liebenau, same address.

Plaintiff, Cross-Defendant and Appellant,

Represented by Attorney Dr. Paul Dienstag at
Berlin W. 57, Buelowst. 22

versus

Universal Pictures Corporation, New York, 730
Fifth Avenue,

Defendant, Cross-Complainant and Respondent,

Attorneys in the Court of first instance: Attorneys
Counselor of Justice Dr. Rosenberger, Dr. Richard
Frankfurter and Dr. Gerhard Frankfurter at Ber-
lin-Wilmersdorf, Nikolsburger Place 2,

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Court of first Instance: Superior Court I Berlin,
File number first instance: 74.0.590/26,

To the District Court, Berlin:

I hereby file this Appeal in behalf of the Plaintiff, Cross-defendant and Appellant against the judgment of the Superior Court I Berlin, rendered on March 4th, 1930, not served as yet, with the motion: to decide according to the prayer in the first instance, under reversal of the judgment appealed from.

GROUND.

First all the statements and arguments of the first instance are maintained and herewith repeated. The testimony of the witness Bruchstein (means: Burstein) is not suitable to justify the point of view, upon which the Superior Court bases its decision.

Further arguments are reserved for a detail brief.

(signed) DIENSTAG

Attorney.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

District Court of Appeal Berlin, June 3, 1932.

25.U.5849/30

Present:

Counsellor of District Court Voss,

As requested Judge,

Court Employee Deichsel as Clerk of the Court

In the Matter of

May-Film versus Universal Pictures Corp.

appeared at the call:

For the Appellant

Attorney Dr. Dienstag

For the Respondent

Attorney Dr. Frankfurter.

As Witness:

Joe May.

After being advised regarding an oath, he was examined as follows:

My name is Joe May, I am 51 years old, Film Director, am not related or related by marriage to the parties, I have a financial interest in the outcome of the lawsuit. I have given a guarantee to the Bank for Foreign Commerce for credits which it has extended to the plaintiff, and for that reason have assigned the claims from this lawsuit to the Bank as security.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

This assignment was made a few days ago, orally to Dr. Lenk, there is also a document in writing in the files of attorney Dr. Dienstag, an assignment signed by myself, which has not been delivered as yet.

There was a discussion between myself and Aussenberg regarding the May-Film Corporation, and it was agreed between us, that besides other assets the claim in this lawsuit should belong to me. I paid 45,000.00 Marks for these assets. The lawsuit was to be continued by the Corporation. After the plaintiff went into liquidation the liquidator demanded confirmation from Aussenberg that the claim sued upon belonged to me and therefore, should not be part of the liquidation assets. I undertook a deficiency guarantee to all the liquidation creditors in the amount of 40,000.00 Marks. Aussenberg gave the same guarantee. I am convinced that there is not any possibility that I be relieved of this guarantee of 40,000.00 Marks, not even if the result of this lawsuit would and could be taken into the liquidation assets.

To the facts:

When the agreement was signed and when I took Burstein to the depot he told me that he signed the agreement * * *

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Certified Copy

25.U.5849/30

74.0.590.26.

In the Name of the People!

(Written by Hand:) "Certified Copy Judgment
given to Plaintiff, Berlin, 8/24/32"

Rendered July 27, 1932.

(signed) Gehrke, Court Clerk, as Official to verify documents for the Business Office.

(Signature)

As Official to Verify Documents

In the Matter of

Mayfilm Corporation, 6-7 Kochstr., Berlin, now in liquidation, represented by the receiver, Attorney Dr. Alexander Maier, 225 Friedrichstr., Berlin.

Plaintiff, Appellant, and Respondent: Attorney Dr. Paul Dienstag, 5 Clausewitzstrasse, Berlin-Charlottenburg,

versus

Universal Pictures Corporation, 730 Fifth Avenue, New York, represented by their Board of Directors, President Carl Laemmle, Vice-President Robert H. Cochran, Secretary Helen E. Hughes, Treasurer E. H. Goldstein,

Defendant, Respondent, and Appellant,—Counsel: Attorney Dr. Sarre, 2 Nikolsburger Platz, Wilmersdorf—Berlin,—

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

The 25th Civil Senate of the District Court of Appeal in Berlin, has, upon oral Hearing of July 8, 1932, in the presence of the President of the Senate, Huecking, and

the Counsellors of the District of Appeal, Kliene and Voss, have ordered adjudged and decreed: Upon appeals of both parties the judgment rendered on March 4, 1930, in the 17th Chamber for Commercial matters of the Superior Court I, Berlin, is changed as follows:

(1) The Defendant is ordered upon the complaint to pay 50,000.—R.M., plus 2% interest over and above Reichsbank discount rate from July 1, 1926.

Prayer of the Complaint for additional interest is denied.

(2) Upon the Cross-Complaint it is adjudged that the Plaintiff is not entitled to damages in excess of the 50,000 R.M., with interest awarded under 1) under the agreement of May 10, 1926.

(3) The costs of the lawsuit are canceled against each other.

(4) Temporary execution may issue under this judgment, the Defendant being permitted to prevent execution of judgment by putting up a bond in the amount of 55,000.00 R.M.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Facts

The Plaintiff alleges that represented by its then Board Member, Joe May, on May 10, 1926, in Paris, it concluded with the Defendant, represented by their Manager of their Berlin office, Burstein, the original contract submitted, with its side agreements concerning the production of the motion picture to be made from the script, "Candlesticks of the Emperor" purchased by the Defendant, to be directed by Joe May. That in paragraph 12 of the contract a contractual penalty of 50,000 R.M. is provided in the event that one party violates its contractual obligations, and that it has further been stipulated that for non-fulfillment of the terms of payment the Plaintiff be entitled to withdraw from this contract with forfeiture of all payments made to that date and reservation of right to the contractual penalty. That the conditions under which the contract was to become effective have taken place, the finance consortium originally planned which was to take over the *the* financing in cooperation with the Defendant or with Burstein personally in collaboration with a Mr. Braatz had not been formed by May 20, 1926, the time agreed upon; therefore no contracts concerning the production of the motion picture were entered into with the consortium; that the businessman Fellner had signed the guarantee provided in the contract for

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

not exceeding a maximum amount of 330,000 R.M. that this declaration had been deposited in the Berlin Office of the Defendant as agreed upon. That the Defendant in spite of this, failed to comply with its obligations to pay up to May 20, 1926, but withdrew from the contract because their representative, Burstein, had made the compliance with the contract dependent upon further conditions, other than those of the original agreement. That, therefore, the Plaintiff had justifiably withdrawn by letter of June 7, 1926, that the contractual penalty had become due, also that plaintiff could claim further damages; that damages in an amount of approximately 142,000 R.M. were suffered by reason of the non-fulfillment of the agreement.

The Plaintiff demands, in the present complaint, that the Defendant be ordered to pay 50,000.R.M., contractual penalty, plus $\frac{3}{4}\%$ monthly interest from January 7, 1926, and reserves further claims for damages.

The Defendant demands dismissal of complaint and further has filed a cross-complaint for declaratory relief, that the Plaintiff is not entitled to the further claims for damages asserted by him. (Plaintiff moves for dismissal of cross-complaint.)

Defendant denies that a binding contract had come into effect.

That according to the specific Power of Attorney, Burstein was not entitled to conclude a motion pic-

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

ture production contract and had stated the same to Joe May. That for this reason the effectiveness of the contract was then made conditional upon approval by the Defendant's president, Laemmle. That, moreover, the contract drawn up on the night of May 9th to 10th by May was not in accordance with the previously agreed conditions, especially with regard to the contractual penalty: that Burstein objected to this in the morning of May 10, 1926, when he hurriedly signed the contract shortly before his departure for America and May conceded to him that the Defendant should have the right to make any reasonable change in the contract; that Burstein had crossed out the stipulation concerning the contractual penalty when signing the contract in the copy which he took to America. That an indication pointing to incompleteness in the contract is that May, but not Burstein, signed the separate pages of the agreement (initialed in the margin). That as is known in motion picture circles, this means, according to American custom, that a mutually binding agreement had not yet come into effect. That an approval on the part of Laemmle had not been forthcoming.

Furthermore, that the condition of the contract regarding non-formation of the consortium was, in violation of good faith and morals prevented by the Plaintiff, since May did not further concern himself

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

with its formation. That May did not consider himself bound since he had allegedly concluded a motion picture contract with the Phobus Company before his withdrawal and declared to the gentlemen in question that he was not bound.

That because of this agreement with the Phobus Company, no damages were suffered by the Plaintiff.

That the condition that Fellner guarantee, that a maximum amount of 330,000.M., production costs be not exceeded, did not occur. That, when Fellner signed the declaration, drafted as agreed upon at the signing of the contract, it was changed by May to an amount of 350,000.M.; that the document, which was later changed back again to 330,000.M., is not clear nor certain, because of the double change, and, in particular, the guarantee for not exceeding the production costs of the picture was a condition for the Defendant according to the intent of the agreement.

That for these reasons, and since the Defendant, or Burstein, in the letter of May 20, 1926, from America addressed to the Plaintiff had only made demands in accordance with the contract, a withdrawal from the contract and a delay of payment had not occurred on their part; that on the contrary, May, without legal grounds, withdrew from the contract, if a conclusive contract existed at all. That

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

he did this because he had found better conditions with the Phobus-Film Company.

The Plaintiff denies the allegations of the Defendant. That the Plaintiff, or May, in fact, had allegedly concluded the contract with Phobus-Film Company after the Defendant had expressed, through Burstein, their intention not to comply with the contract. Damages were suffered since the conditions with the Phobus-Company were worse and the contract could have been effected with the Phobus Company at the end of the three months which had been allowed for production in the contract with the Defendant. That Burstein had not shown his Power of Attorney when signing the contract but emphasized orally that he was the General Manager with Full Authority. That he had expressed himself to the same effect on various other occasions in Europe, and therefore, with the knowledge of the Defendant, presented himself as their General Manager with Full Authority, as, for examples, in a contract with Galitzenstein in June, 1926, but even previous to this and on other occasions. That this constituted implied power of attorney.—That the condition concerning the consortium failed because the interested party, Braatz, did not busy himself with the matter, as well as for the reason that the Defendant, himself, sent no news from America concerning their participation. That the further condition regarding the

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

guarantee of Fellner had taken place since the change was immaterial and had been changed back with the knowledge of Fellner; that Fellner had actually undertaken the requested guarantee. That the document had been deposited on time, in this case, May 19th, at the latest. That a breach of contract on the part of the Plaintiff did not occur since, after receipt of Burstein's letter of May 20, 1926, it had to figure on non-fulfillment on the part of the Defendant, and was forced to enter, at least, into a contract with the Phobus Company in order not to remain entirely without production.

After taking evidence, the Superior Court dismissed the complaint and the cross-complaint by the judgment of March 4, 1930, herein referred to. Against same, both parties have filed appeals, and prayed:

The Plaintiff: to render judgment according to the complaint under reversal of the former judgment and dismissal of opponent's appeal;

The Defendant: to render judgment on the cross-complaint by reversal of judgment, and dismissal of opponent's appeal and possibly the permission be granted to them to prevent execution by posting bond.

The parties have, to begin with, essentially repeated their arguments of the first trial, the Plaintiff's briefs of June 27, 1930, January 24, 1931, the

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Defendant's briefs of Aug. 5, 1928, Nov. 28, Dec. 3, 1930, and Feb. 5, 1931, being herewith referred to. Then, by an order of Dec. 5, 1930, a hearing to take testimony was set, the taking of which was considerably delayed by the absence of some of the witnesses, both parties having again exchanged briefs, the contents of which were submitted at the last hearing, the Plaintiff's briefs of June 8, 1931, May 23, 1932, June 27, and July 7, 1932 and the Defendant's briefs of August 11, 1931, July 4 and 5, 1932. and the supplementary documents presented at the hearing, being herewith referred to. Regarding the outcome of the hearing to take testimony, the minutes of March 21, and July 7, 1931, and June 3, 1932, are herewith further referred to.

The Plaintiff objects to the use of the affidavit of Fellner and the notations in the files of Dr. Frankfurter as evidence.

The Defendant lastly objects to the Plaintiff being the proper party (since the claim, in reality, appertained to Joe May personally, as becomes evident from the first part of his testimony), as well as to its being the proper party defendant since the contract had been concluded with the independent branch office in Berlin.

The Plaintiff requests that these objections be overruled as belated, especially the latter.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Grounds for Decision

I) The contract upon which the complaint is based, was concluded in Paris between a German Motion Picture Company (Plaintiff) and an American Corporation. The question arises as to which country's laws are to be applied. It is generally accepted that in such cases, where the parties have agreed upon a certain place of jurisdiction for the decision of controversies arising from a contract, the law of the place of jurisdiction is considered as the law which they intended to apply. In the contract the condition is stipulated under paragraph 14 that the place of jurisdiction shall be Berlin-Center. Therefore, German Law is to apply to the relations existing between them. Berlin has also been agreed upon as the place of performance in question, (the production of the motion picture, "Candlesticks of the Emperor",) and the obligations of payment of the Defendant, (which were to be made by their Berlin Office as place of payment) the center of their obligations is, therefore, also in Berlin, and in Germany. Consequently, German law is to be applied.

II) The Plaintiff is entitled to sue upon the claim. For its contention that this is not the case, defendant relies upon the testimony of the witness, Joe May, according to which he is alleged to have discussed and agreed, as stockholder, with the other

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

stockholder, Aussenberg, that besides other assets the claim here sued for belonged to him, while the suit was to be continued by the Corporation; May has, as he has stated, taken upon himself a deficit liability towards the liquidation creditors of an amount of 40,000. Rm.; he also claims to have paid 45,000 Rm. but states, on the other hand, that he would not be released from his liability even if the result of the present law suit should go into the liquidation assets.—According to this testimony, it must be assumed that the claim was not really “assigned”, so that it was transferred from the corporation to one of the associates, May, but that the agreement between the associates was that after completion of the liquidation, the asset in question should be transferred to the associate, May, out of the remaining assets. It is supposed to have been especially agreed that the corporation should be authorized to continue the litigation, and therefore be entitled to the proceeds of the law suit. The Plaintiff is the corporation, represented by the liquidator. Distribution of the assets of the corporation among the associates would be invalid as to him, before the corporation debts were paid, because the associates are not authorized to divide among themselves the assets of the corporation, without taking care of the debts.

III) The Defendant denies to be the proper debtor. That the agreement was not made with it,

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

but with the Berlin Branch, an independent legal entity, to wit, a limited corporation. This objection first was made in the last Oral Hearing in the Appellate Court, but it could have been raised by the Defendant in the first instance. The Court has come to the conclusion that it has been raised only for the purpose of delay, that the failure to raise it sooner is gross negligence. This objection, therefore, was rejected according to Section 529, Code of C.C.P.—furthermore, it is not justified. As parties to the contract in the main agreement of May 10, 1926, are named, the Plaintiff on one side, the Universal Film Corporation, New York, Branch Office, Berlin on the other side. The correct name of the Defendant is, "Universal Pictures Corporation, New York."

The agreement and the side agreements are to be considered as one agreement. In the side agreements there always appear the heading: "To the Universal Pictures Corporation, New York Berlin." From this it can be seen that the American Corporation was meant as party to the agreement, and it must be assumed that it had also a branch office in Berlin, which through its representative, Burstein, has the position of a representative and of that party, to which the detailed completion of the agreement was left by the regular party to the agreement. Since so much stress has been laid upon the fact that the agreement was signed before the departure

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

of Burstein for America, and that one copy was taken along by Burstein to America, it was clear between the parties that the American firm was the party to the agreement with the Plaintiff, and the binding of this firm apparently was essential to May. This Burstein not only could see, but he realized it. For these reasons, the incorrect wording in the heading of the main agreement cannot speak against the fact that the Defendant is the proper party Defendant.

IV) The Complaint is based upon the provision in Nos. 12-13 in the agreement of May 10, 1926:

12) "In case of violations of this agreement, the party violating the agreement shall pay to the party complying with the contract a *contracual* penalty, not subject to judicial reduction in the amount of Fifty Thousand Marks, without prejudice to the further claims for damages.

13.) Non-compliance with the terms of payment entitles the Mayfilm to cancel the contract, with forfeiture of the payments made until then. The right to the contractual penalty and further claims for damages is not affected thereby."

No. 12 has been crossed out in the copy of the agreement of Defendant in indelible pencil. No. 13 has not been crossed out. In the copy which Joe

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

have agreed that this agreement (signed by Burstein) of May 20, 1926 shall go into effect if,

1.) The finance consortium planned between you (Burstein) and Mr. Braaatz for the financing of the film 'Candlesticks of the Emperor' has not been formed until May 20, 1926.

2.) The agreements contained in the Exhibit of Mr. Fellner and myself have not been signed by the consortium under the guarantee of Universal until May 20, 1926.

3.) Mr. Hermann Fellner has not confirmed by his signature the guarantee for the Mayfilm agreement given by me today under his power of attorney." Regarding Paragraph No. 3, the parties agree that the word "not" should be left out as the signature was the condition for the going into effect.

This, then, was a compilation of the conditions under which the agreement, the wording of which was put down in the main document, was to become effective. If Laemmle's approval had been a condition, it certainly would have been inserted at this place. The entire wording of the agreement, as it has been submitted, shows that it was discussed in great detail and that the author took great pains to include everything which had been agreed upon. As surplusage, the main agreement contains the clause in paragraph 15 that oral agreements have not been made beside this agreement. The contract involved

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

a large object, much depended upon it for the Plaintiff, as Burstein knew. If as a business man, he signed the agreement, as it was submitted to him in the morning of May 10, 1926, he must apply it against himself and cannot justly object that the agreement was not entirely in consonance with the conferences. If he did not want it, Burstein could have easily crossed out the clause regarding oral side agreements. The other side had to assume under the circumstances that Burstein intended the contract in the present form. If he really stated that, "he could not really do it, but that the Director General, Laemmle would approve it without question" this was not a mutual contractual statement of intent in view of the signed contents of the agreement, but an irrelevant unilateral remark, which was made by way of conversation, and which the other side could mainly consider as applying to the inner relations between Burstein and his American principal.

This construction is given weight by the fact that Burstein later, at a time when according to the statements of Defendant, Laemmle had not given the approval in question, took the position that not he or the Defendant, but May, or the Plaintiff violated the agreement that then (in the letter of June 10, 1926) he did not point out the lacking approval of Laemmle. Also, that he did not notify the Plaintiff promptly as to the approval or non-

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

approval. It is true the time therefor was short. It had to be decided until May 20th, whether the agreement should be effective or not. This short space of time speaks against the fact that Laemmle's approval was to be secured first. It must be assumed that if this really was agreed upon, Burstein would have gotten in touch with Laemmle by cable and would have secured his statement promptly.—In any event, the burden of proof is upon the Defendant (in view of the written agreement). That the approval was a condition of the contract and this burden of proof has not been met and would not be made, even if May later told other people that he did not consider himself bound when he made an agreement with Phoebus Corporation; he couldn't say anything else, as otherwise its representative would not have made an agreement with him. If the witness, Liebenau (whose affidavit Defendant submitted, to which Plaintiff objected as evidence, and which cannot be used as such; the witness himself could not be reached) would testify as stated in his affidavit, this would not be decisive. He only says as he was advised that the agreement with May was concluded with the proviso that it had to be approved by Laemmle (it cannot be ascertained by whom he was advised); inasmuch as Liebenau was not present when the agreement was concluded, this statement cannot be of decisive value.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

The assumption that it was an offer of the Plaintiff with unilateral binding, must be rejected for the reasons stated. The fact that Burstein (in contrast to May) did not initial the various pages, cannot prove what Defendant has to prove. It is a point which can be used for interpretation in favor of Defendant, and must be considered, but it is not sufficient. First, the omission of the initials can easily be explained by the hurry in which Burstein finally signed (while May had more time during the night when working). It is very doubtful whether Burstein as a Swiss citizen, who had his residence usually in Switzerland when making an agreement with a German firm, laid such stress on a possibly existing American custom, according to which it was usual and necessary for mutual obligations to initial the various pages. As a matter of form, this point cannot be considered, because as has been explained under I, the relation between the parties must be judged according to German law. Therefore, the form of a transaction is governed by German law, according to Art. 1, E.G.B.G.B. (Introductory Law to the Civil Code).

2) The Defendant has submitted an American Power of Attorney for Burstein (Translation Vol. I, P. 157 exhibits), which says that Burstein is hereby authorized to represent it in the territory named with the following rights and under the fol-

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

lowing restrictions: now follow under twenty-six numbers special kinds of transactions, which the representative is authorized to do. Under these transactions the concluding of agreements for the productions of films is not included in No. 24, which says in so far as the Power of Attorney authorized Burstein to make agreements regarding matters other than the specific delivery of films of the Corporation to others (i.e. leasing of films) that the Power of Attorney is restricted to transactions which do not involve an amount in excess of 5,000 Dollars.

According to the wording of this Power of Attorney, Burstein certainly was not authorized to represent the Defendant in the agreement made on May 10, 1926, since this agreement assigns to the Plaintiff the production of a film, "Candlesticks of the Emperor", for a price of 300,000 R.M. (also a guaranteed minimum income of 60,000 R.M. from the interest in the countries outside of Germany, France, Belgium, Switzerland, U.S.A.) According to generally accepted law principles, anybody who deals with the representative must examine the Power of Attorney and runs the risk that the alleged Power of Attorney does not exist. Therefore, the agreement is not binding for the principal. Besides these generally-accepted law principles, the jurisdiction has recognized an implied Power of Attorney in the interest of legal safety

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

in commerce and business in such cases, in which the representative with the consent of the principal, acts to the outside as a representative. The giving of a Power of Attorney can, in principle, be made without any particular form. It would be against good faith and morals if the principal who consents to the appearance of a representative in his name could reply upon the contents of a Power of Attorney which is unknown as to its details, containing many clauses and is restricted. That is the situation here. Burstein used the designation on his letterheads, which could only be considered by the German parties to the agreement that he had General Power of Attorney. The letterhead reads as follows (in big print):

“Universal Pictures Corporation”

of New York

Carl Laemmle, President”

on the left side it says: “L. Burstein

Office of the

General Manager”

and on the right side, the business address in Berlin is given.

From this, it can only be deduced, without detailed knowledge of the conditions, that L. Burstein was the person who was generally authorized to conclude business transactions for the American

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Corporation in Germany. The term "General Manager" is not generally known here in its meaning. An authentic interpretation was given by Burstein when he called himself, in the agreements, "General Representative". This happened, for instance, in the agreement with Galitzenstein, which was notarized on June 14, 1926, also regarding the production of a film. In the side agreement of May 10, 1926, in the case at bar, Joe May states and Burstein confirms by his signature: "You have stated to me today that you are the General Representative of the Universal Pictures Corporation, or Mr. Carl Laemmle, and have signed today an agreement with Mayfilm Corporation in the name of this principal." The Senate has drawn the conclusion from this, i.e. the Board of Directors in America had knowledge of these actions and consented to them. In view of the correctness of Burstein in business matters, which has been alleged by the Defendant itself, he would have not acted in this manner if he did not know that this was in conformance with the will of the Defendant, given either expressly or impliedly. This can be deduced from his own statements as a witness, when he states "morally" he was authorized to conclude the agreement; apparently he had in mind the contrast to the contents of the Power of Attorney with its detailed provisions and says that they alone are to be considered for the "legal"

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

determination. The "moral" power can only be deduced from the fact that he knew from former transactions, that his principal approved his actions as a representative also in a case as the one above. It is not conceivable that the Board of Directors of the Defendant had no knowledge of the manner in which Burstein called himself on the letterheads, and how he conducted himself in business transactions. It must be taken into consideration that Laemmle is also of German descent, that therefore he was familiar with German conditions. According to Burstein's testimony, he (Laemmle) had already approved the idea in principle to produce films in Germany through May. He, therefore had to figure, and certainly did figure, that Burstein, the only representative in Germany, would take the necessary steps and, if necessary, would conclude agreements which had to do with this production. With what appearance Burstein acted and how the business world considered it, can be judged by the testimony of the editor, Weiner; he says that it was generally known in film circles that the general representatives had all the powers as far as outsiders were concerned, but that in their inner relations they had to submit matters in America for a decision. The witness, Braatz, a man well-versed in this business, testified he would have considered the agreement as concluded, if it were made by Burstein in the name of the Defendant.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Therefore, the Court concludes (the same as the Superior Court) that the Power of Attorney of Burstein for the Defendant was in existence according to the theory of ostensible authority. (theory of legal appearances).

VI. The Superior Court considered the claim to the contractual penalty unjustified, for the reason that May, as representative of the Plaintiff, gave Burstein, as representative of the Defendant, when entering into the agreement, the right to make any reasonable change; that therefore, an agreement of the parties had never been reached in principle, but that the Defendant had the right to cross out of the agreement any onerous provisions; that it was immaterial whether this happened in the presence of May or later; that there was no meeting of the minds regarding such points. The uncertainty which would result from this assumption, viz: regarding which points an agreement had been reached and regarding which points it had not been reached, shows that this consideration is not correct. The entire agreement composed of the so-called main agreement, the side agreement regarding the conditions and the guarantee of Fellner for prompt production and compliance with the price of production, and on the other hand of Fellner and May for compliance with the obligations and the numbers 8, 9 and 17 of the main

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

agreement, must be considered as an entity which belonged together as to its contents. All the documents named were written out at the time by May, in duplicate, were signed by both parties (except the guarantees by which Burstein undertook no obligations for the Defendant) and each party received a copy. If one agreed only "in principle" an agreement regarding all points for which statements were made had not taken place, then Paragraph 154, Civil Code would apply and the agreement could not be considered as being perfected. An agreement in which one party shall be authorized, without the consent of the other to make any changes which he considers reasonable (in case of controversy the Court would have to decide according to Paragraph 315, Seq. Civil Code, whether the changes were reasonable?) lacks the necessary certainty in the opinion of the Senate. The allegation of the Defendant is contradicted by the fact that none of this right was put in writing. One short statement of the Defendant is sufficient: "Universal reserves the right to change." Since nothing like that was included in the agreement, these statements must be construed to mean that the Plaintiff would favorably consider a desire for a change of provisions of the agreement, which would not affect essential parts. May testified as a witness that he made a remark at the

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

end that if Defendant desired any changes, he would not be unreasonable and would consider it—or something similar. This was only an informal promise of a later mutual understanding, if wishes for a change would appear, but not concession of a unilateral right to changes. In the interest of certainty of agreements—that would be the interpretation of such right to changes—any wish for changes would have to be stated immediately and by telegraph, but not, as happened here at a time when the contractual penalty was declared forfeited and was demanded. If the right to change had really been granted, it would be effective only for a short space of time, and would have to be exercised immediately. The fact that it was not exercised immediately, speaks against its existence, i.e., against the existence of an intent in this respect. The omission of the contractual penalty cannot be considered an immaterial change. It is irrelevant whether it is customary in such agreements or not. Even if it were not contained in the former draft (which was made for the agreement between the Plaintiff and the finance consortium) May could consider it necessary to insert it in the agreement with the Defendant. It was not a unilateral obligation, the right to sue was given either party which complied with the agreement against the party violating the agreement, i.e., also against the Plaintiff; only in this respect Plaintiff was favored

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

as against the Defendant, as the right to the contractual penalty was given also in case that it withdrew from the agreement because of non-compliance with Defendant's obligations to pay; such right to withdraw was expressly provided for in the agreement (No. 13). These provisions of the agreement prove that the contractual penalty played an important part for the Plaintiff. The crossing out meant a change, which presumably was not within the intent of the Plaintiff, one which could not be considered "reasonable" within the meaning of both parties. Even if one would agree with Defendant's position in other points, Defendant could not be authorized to cross it out unilaterally.

VII. The agreement was conditioned in three ways, as was mentioned in V at 1.

1.) The conditions to 1) and 2) (that the finance consortium did not materialize and that no agreement was concluded with this consortium) interrelated. That these two conditions occurred is not denied,—the consortium did not materialize. The Defendant claims as a defence that the Plaintiff or its representative, May, prevented the happening of these conditions against good faith and morals. For this there has not been sufficient evidence. It is supposed to have consisted in this,—that May did not pay any attention to the formation of

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

a consortium. This May does not deny, but the Plaintiff denies that he had to pay attention to this consortium, because it was the business of Burstein and Braatz. The Court agrees with this interpretation. According to the letters, copies of which are filed and which preceded the agreement with Burstein of May 10, 1926 (Exhibits of Plaintiff's pleading of March 23, 1927, which have not been denied, and have been confirmed in various points by Braatz' testimony) the idea to produce several films with May and his corporation for a consortium of a German and American group originated with Braatz, who interested Burstein in this matter. Braatz drew up in advance the agreements to be concluded between the consortium and the Plaintiff. The condition was that the Defendant and some German financiers could come into the finance consortium. Before Burstein's departure for America, a conference between him, May and Braatz had taken place on April 29, 1926, in which the conditions for the production of the film, "Candlesticks of the Emperor" by May and his firm had been laid down in general terms. The other party to the agreement was a consortium, "Burstein-Braatz-Liebenau". May obligated himself to make two more films for the consortium under the same conditions, if Burstein would cable

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

his willingness within fourteen days after his arrival in New York, in May, 1926. May also reserved the right to finance the said film himself, to produce it and to offer it to the consortium. On May 6, 1926, Braatz asked by telegram whether he could meet Burstein in Geneva. Then, on May 8th, announced himself at Burstein's in Paris for the following Sunday, so did May. When May arrived in Paris and called on Burstein, Braatz failed to show up, but could not be reached at the hotel, which he had given as his quarters. May was very angry about that, but feared that the whole plan would fall through, and expressed himself to the effect to Burstein. Burstein had to leave the next day, and therefore, suggested to May to make a contract agreement with the Defendant, in case the consortium planned by Braatz wouldn't materialize. Under those circumstances it cannot be said that May and his firm undertook the obligation to bring the consortium together. It is true they were not allowed to prevent it, because then they would have brought the condition about against good faith and morals. That they took any steps in this direction, has not been claimed by the Defendant. The mere omission to help bring the consortium together is not an action against good faith and morals in the meaning of the

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

contract, since May could rely on the fact that Braatz, who had planned the entire matter and who had relations through German financiers, would do the necessary thing in this direction.

Therefore this objection of the Defendant's is also unjustified.

2.) The third condition for the going into effect of the agreement was that Fellner signed the guarantee. This guarantee read:

"To the Universal Picture Corporation
New-York Berlin
care of Mr. Burstein

In my own name as well as in the name of Mr. Hermann Fellner. Power of Attorney, I hereby declare:

Should we have to produce for you, or for a subsidiary company of yours, the motion picture, "Candlesticks of the Emperor", we assume the full liability, a case of force majeure excepted, to the extent of the price agreed upon which is an amount of

including premium—330,000. Mk,

Three Hundred Thirty Thousand Marks, as well as for proper delivery on time three months after the first day of shooting.

Paris, May 10, 1926

JOE MAY"

"H. FELLNER"

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

The last signature, that of Fellner, may be found on the document filed in this lawsuit. But the document has been changed, the figure 330,000 was first changed to 350,000 then back to 330,000. Also there is a change on the spot where it reads "30" (thousand marks) of the figures that were written out in letters under the figures 330,000. But it is well possible and probable that it first had read thirty thousand, then was changed to fifty thousand, and then was changed back to thirty thousand. The word is thereby made illegible, also the more since, beside it, the following annotation has been made:

"30,000)
)
10,000)
)
20,000)
)
20,000)"

from which it was supposed to have become clear how the 350,000 came into being; since these figures have not been crossed out in the act of changing this document back again, the document presents a doubt as to which figure is the correct one.

The condition of the contract is indeed to be construed in the sense in which it is interpreted

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

by the Defendant in so far as the Defendant was to be granted certain adequate proof of the assumption of the Guarantee by Fellner. The Defendant assumed that while May was a capable director, he was rather difficult to manage, and that in the first place it was to be feared that the production would become more expensive than budgeted and would take longer than the time agreed upon. This was May's reputation in such circles. Therefore, it appeared necessary to the Defendant, in this case Burstein, to place Fellner in a position beside May and to make him liable, next to May, for a dependable, businesslike, and economic conduct of the production, so that the amount and the time allowed for production would not be exceeded. For this, Fellner received a premium of 20,000 Mk., and May a similar premium of 10,000 Mk; in this way, if the production cost of 300,000. Mk. is added, the figure, 330,000. Mk, came into being. May states that Burstein had held out the prospect to him in Paris that a special premium of a further 20,000. Mk., would be allowed him; and therefore, he regarded himself entitled to change the 330,000. Mk, to 350,000. Mk. This is not stipulated in the contract or in the so-called side agreement containing the terms.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Conversely, it is here stipulated:

“We have further agreed that Mr. H. Fellner and myself shall deposit with your firm in Berlin, the guarantees signed by Mr. Fellner and myself today; on the other hand, you have obligated yourself to make a payment to me of the amount of 25,000, Mk,

Twenty-five Thousand Marks
in cash against this deposition.

“This payment will either be figured into the contracts of the consortium to be concluded with Fellner and myself, or will, if they are not perfected by the 20t, be regarded as part payment of the first installment of the contract, so that, on the 20th of May, a payment of the balance of 10,000. Mk, would have to be made.

“I ask for confirmation on the enclosed copy as a sign of your accordance with this matter.

“Very sincerely,

“Paris, May 10, 1926.

JOE MAY”

“L. BURSTEIN”

The remaining payment of 10,000. Mk, for May 20th was figured as follows:

15,000.Mk. had already been paid by Burstein for the Defendant at the purchase of the script; therefore, the contract reads, where the

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

payments of 50,000. Mk. each are referred to for the first payment:

“50,000. Mk. to be paid at the conclusion of the contract (15,000 having already been paid for ‘Candlesticks’)”

If, then, a further amount of 25,000, had been paid before May 20, 1926, at the moment when the document was deposited, the first installment would have been decreased to 10,000. Mk, the rest of the payment the Plaintiff, May, in this case, would have already received.

There can be no question of May's not being permitted to increase the cost of production.

The deposition of the guarantee at the Berlin Branch of Defendant should supply the security that the condition of the signature of Fellner had been complied with. Then the Defendant was to assume an advance payment to May as consideration for the first 50,000. Rm. payment for services rendered. For the effectiveness of the contract of May 20, 1926, it would actually be sufficient for Fellner to sign the guarantee. For this purpose it could not be changed in text, for it was to serve as an evidence for the Defendant by which the Defendant was protected in case of a lawsuit against Fellner in any eventuality. Hereafter, the condition that Fellner sign the guarantee as it was drafted on May 10, 1926, by agreement of the

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

two contract parties, did not take place. But the "condition" is, from the viewpoint of the senate, not to be construed to the effect that the necessary formality could be set aside by the Defendant and Burstein if only the guarantee had gone into effect and was not disputed by Fellner himself. May had Fellner sign the guarantee after having changed the figure to 350,000. Then on May 19, 1926, he deposited this and the other guarantee (for the keeping of conditions as of 8, 9, & 17 of the contract) with his and Fellner's signature at the Branch Office of the Defendant with the employee, Miss Valentine. The guarantee in a changed form he asked to have returned to him on the same day (as he says) or, perhaps, on the next day, and changed the figure back to 330,000. Mk; in this form Miss Valentine then accepted the document and it was thus later presented to the court. Now, on the 18th of May, 1926, May and Fellner telegraphed to Burstein in New York:

"Confirm option two further pictures Candlesticks conditions immediately included option expires on the 25th.

"Fellner approving May's Paris signature. In case you wish Mahomet direction,

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

must be decided before the 20th because of
desired arrangement for Candlesticks.

MAY

FELLNER''

From this it was evident to Burstein that Fellner had accepted the guarantee regarding which the signature of Fellner was in question; he could have held Fellner by reason of this telegram. Further, in the testimony of Fellner it becomes clear that he had undertaken the guarantee not only for the amount of 350,000 mk. but also for 330,000 Mk. Legally, Fellner was bound, only the documentary evidence provided for in the contract was not made out in the form prescribed by the contract. Burstein was requested in a telegram of the Plaintiff of May 13, 1926, to instruct the Berlin Branch Office regarding payment of the 25,000 M. Therefore, he had every reason to reassure himself of the correctness of the deposited guarantee. Under certain conditions, the 25,000 M. were to be paid out even before May 20, 1926.

He was obligated in the interest of a compliance with the contract according to its meaning as far as the other side was concerned (also from the point of view of culpa in contrahendo), to give to the Berlin Branch which had to look into the correctness, the necessary direc-

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

tion, as to what was necessary and what statements had to be secured. The documents could not be sent to America within the short space of time. It must be considered that the Berlin Branch, according to the contract, was authorized, to make this examination in representation of Burstein who was in America, because, as was known to the parties when they concluded the agreement it had to be made there. Miss Valentine, the local employee of Burstein, who took care of the business of the Berlin Branch, accepted the guarantee in the changed form submitted, without raising objections. Burstein, himself, did not care about the form any further, although he noticed from May's actions (from his telegram of May 14th and the later telegrams in which he demanded payment of 25,000 M.) that May considered the condition 3 of the side agreement of May 10th as complied with. Even later, when Burstein had returned to Europe, he never made any objections to the form of Fellner's Guarantee. According to good faith and morals these actions of Burstein can only be construed to mean that he overlooked the form requirements and approved the Guarantee as given, that the Defendant was also satisfied with the smaller Guarantee (then was granted it in document)

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

which was given her in the telegram of May 18, in which Fellner conformed his signatures and the Paris documents.

Defendant, therefore, cannot raise any objections against the validity of the contract by reason of the failure of the conditions.

VIII. If it has to be concluded that the agreement of May 10, 1926, was binding for both parties that the conditions had taken place or had been dispensed with, the further question is whether the defendant violated the contract, as Plaintiff alleges.

The Senate considers these violations not so much in the failure of payment but in the withdrawal by Burstein from the agreement. The Plaintiff was to produce, for the Defendant, the film, "Candlesticks of the Emperor", the manuscript for which the Defendant had already acquired. According to Paragraph 1 the manuscript was to be submitted to the Defendant for approval. This was so because May, who was to direct the film, was to make changes for the production and they had to be approved by the Defendant before shooting. This, therefore, was not a "condition", upon which the contract would remain invalid, but was a right granted the Defendant for the performance of the work undertaken. In this respect the Plaintiff did not fail to perform because matters did not extend that far.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Paragraph 2 regulates the minimum cost of production (275,000 M)

Paragraph 3 fixes the mutual rights in filling the various roles

Paragraph 4 regulates the time allowed for production (three months)

Paragraph 5 regulates the conditions of payment; 50,000 M.

Upon conclusion of the agreement (since it was to go into effect on May 20th, on that day), then 50,000 M. each on 6/10, 7/10, 9/1, 10/1, 11/1, 1926. This was the consideration for the production of the film under restriction to the distribution in Germany, France, Belgium, and Switzerland.

In Paragraph 6 further consideration on the part of the Defendant has been agreed upon, namely, of the gross income from the distribution in all other countries, in which the Defendant has its own leasing organizations, 8%, in all other countries, 15%, and a guaranteed minimum income from all these countries (except Germany, France, Belgium, Switzerland) of 60,000 M, payable Dec. 1, 1926. Another participation of the Plaintiff was provided for the United States of America.

Paragraph 7 contains a general obligation of the Defendant, to have the interest of the Plaintiff in mind as a party in interest.

Paragraph 8 contains the undertaking of the full Guarantee of the Plaintiff for the 150,000 M. paid

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)
during production, 8a.) obligation regarding the negatives, 9) the obligation to pay damages upon exceeding the time for production, 10) relates to insurance of the actors and the *director*, 11) stipulation as to "May-Production" 12) the contractual penalty, 13) Plaintiff's right to withdraw from the contract on account of non-payment, with reservation of the right to the contractual penalty and further damages, 14), jurisdiction (venue) Berlin-Center, 15) exclusion of oral agreements, 16) provisions as to the ownership of the negatives, 17) Guarantee of the Plaintiff not to hypothecate the negative.

After concluding the agreement on May 10, the following transpired:

The finance consortium on which Braatz was working, did not materialize. On May 18th, May and Fellner addressed to Burstein at New York the telegram mentioned above, with the statement that Fellner had joined. In it is mentioned an option for two further films; there must have been such wish expressed by Burstein previously, regarding which nothing had been mentioned. On May 14th, the Plaintiff had already cabled to Burstein to instruct the Berlin Branch as was stated above. On May 19, 1926, the documents were deposited by May at the Berlin Branch, that is, two Guarantees (as appears from the statement of the Defendant

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

without contradiction by the Plaintiff. See Miss Valentine's statement, Exhibit 17 of Defendant's pleading of August 11, 1931), accepted by Fellner, copy of the agreement of May 10, (i.e. the "main agreement") copy of May's letter to Defendant (i.e. the "side agreement" of May 10). Then May's change back to original of one guarantee took place either on May 19th, or, at the latest, on May 20, 1926. On May 20, 1926—the day on which the agreement now went into effect and the Defendant became obligated to pay 35,000 M. of the first installment, a telegram to the Plaintiff arrived: "Confirm arrival letter 28th afterwards payments will be made. Burstein." The Plaintiff awaited the announced letter; it is understandable that they were worried by the telegram because (as was shown to Burstein) there was involved a question of work and the preparations for the productions (keeping up of the office, etc.). According to the Plaintiff's allegations, the letter arrived only on May 31st; according to the Defendant's allegations, it arrived promptly on May 28th. However, that is immaterial. On May 29th the Plaintiff cabled to Burstein: "Letter 28th not yet received. Paris agreement not been complied with by you. Cannot understand. Reserving all our rights with regret." The letter of May 20th, which then arrived, had the following contents: Burstein says

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

he cannot understand May's nervousness; that he is very much interested in the matter. That May inserted in Paris into the agreement at the last moment points, which had not been discussed, that he refused to accept them; that thereupon, May declared upon his word of honor that he would agree to any later change (which Burstein would demand after his return to Europe). That he was now stating that May had obligated himself to engage only English, French stars, besides the first-class German actors, to take in the Opera Ball in Vienna or Berlin, and that the manuscript would have to be approved. That it was understood, since several films were involved, that May would agree to any reasonable demand. That he had a great responsibility to Universal and that he could not submit any agreement which did not comply with the business usages.

That, therefore, he requested May to work further on the preparation of the manuscript; that Burstein would instruct his office immediately to pay him 25,000 M, if May would confirm this letter without reservations; that he reserved the right to refer back to the matter of the Braatz consortium which fell through. That he would start his return on June 3rd. That, therefore, May would receive the fixed price of 300,000 M. for the film, and 30,000 M for the guarantees undertaken by

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

himself and Fellner. That he could not say anything regarding the option, because Laemmle was not in New York. P. S.: That he must have word immediately whether the Braatz consortium had materialized, because otherwise he could come to no decision.

On the same day Burstein wrote to Fellner also and encloses a copy of his letter to May and asks him to use his influence with May; that he would not see any delay caused by him because May could not get ready with the manuscript before June 10 and that then he would be in Berlin himself; that he had the best intentions and hoped that he would find understanding and courtesy from the other parties.

In the opinion of the court this letter constitutes a cancelation of the contract. It is written in the most polite terms and with the expression as if Burstein still had the greatest interest in the matter and wanted to further it as much as possible. On the other hand, it contains the demand to the other party that he should agree to any possible change of the provisions agreed upon. The Plaintiff was not obligated to do that in any way. The Plaintiff could not do it without being completely in the hands of the other party and renouncing its rights under the agreement. The Plaintiff was asked to acknowledge that the written agreement of May 10th, which was executed by signatures of both parties, with its

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

side agreements and provisions, did not exist legally. If it did so, Plaintiff was from then on entirely dependent upon the voluntary courtesies of the other side. This would not have been dangerous under certain circumstances if a minor matter or a small object was involved. Here there was in issue for the Plaintiff considerable values, it was liable to suffer serious economic damage if after Burstein's return to Europe unacceptable changes were demanded. If one assumes, as the Senate has, that the agreement was binding for both sides, the letter of May 20th constitutes a withdrawal from the contract, a positive violation of the agreement, and it is immaterial whether the agreement was also violated by failure to comply with the obligations to pay, and whether in this respect the Defendant could set forth the excuse that it had no knowledge of the occurrence of the conditions, so that payment was not made for reasons for which it was not liable. Regarding the withdrawal from the contract in the manner in which it was done by the letter of May 20, 1926, the Defendant is liable therefor; with due diligence the Defendant should have realized that the agreement had been duly perfected, the Defendant cannot bring up the excuse of lack of legal knowledge.

The Plaintiff cabled after receipt of this letter of June 1, 1926, that the letter was unacceptable.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

“Inasmuch as the finance consortium has not been formed until the 20th, the Paris agreement has gone into effect. This agreement alone and solely is binding for us. Agreed payment has not been made. Must reserve all our rights. Mayfilm.” To this Burstein replied from the boat that Joe May’s standpoint was “unjust” (he meant unjustified).

On June 7, 1926, two letters were written, by the Plaintiff to Burstein, Universal Films, in Paris, (where Burstein had arrived meanwhile): that the conditions which had been agreed upon in the contract had not been complied with by Burstein; that the Plaintiff was obligated to withdraw from the agreement entered into; that all further rights were reserved. At the same time May, personally, wrote to Burstein that he had long endeavored to come to an agreement with him, that he finally went to Paris and concluded the agreement, that he went away from there, convinced that matters with Burstein were in order. That he regretted that the written agreements had not been complied with, that he only awaited the announced letter of the 20th under reservation of his rights; that he was surprised about the contents thereof and recognized that Burstein did not intend to comply with the written stipulation of the agreement. That he had given his word of honor that he would assist Braatz with the consortium but that this only applied to May 20th; that he kept his promise but heard noth-

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

ing from Braatz. If Braatz had complied with the agreement and had made different proposals to him after his return, he would not have been inhuman and would have shown him consideration. That thus he lost valuable weeks. That he did not know what to think of the whole affair but that he could not jeopardize his whole existence. That after receipt of the letter of May 20th, he started other negotiations, in order not to let the damage get larger, and that finally he made a production agreement with Phoebus. That he requested an early conference.

Burstein replied from Paris and maintained his viewpoint that he was authorized to demand the changes, because May *conced* him in Paris, after the agreement was signed, when it was pointed out to him, that the agreement did not conform with the previous discussions, but contained conditions more favorable to May. That May was principally interested to get a contract, that he (Burstein) got it through, and that he did not see any reason why May refused to carry out the contract; that he should have set a time limit before withdrawing. Burstein came to Berlin after June 18, 1926, and a conference took place between him and May, which, however, did not lead to any accord. In July the Plaintiff made claim to the contractual penalty.

May concluded the agreement with the Phoebus Corp., not on June 7th, as he writes on June 7th,

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

but on June 4th; the contract is in evidence (Exhibit to pleading of June 27, 1932, Page 118, Vol. III of the file).

These letter~~d~~ do not constitute an excuse for the Defendant, because it did not relinquish its demand to make any desirable changes, but endeavored only to prove to May the correctness of their viewpoints. It could not be expected from May and the Plaintiff any *moe* to give into that. In order to safeguard production for the year in question and in order not to lose the time, it had to act quickly and to make its decisions. Otherwise, the danger was that it would "sit between two chairs" and expose itself, in view of Burstein's interpretation of the right of the Defendant to make changes. to too great a danger that the written stipulations, which were binding, would be changed unilaterally to its disadvantage. It was therefore justified to enter into the agreement with Phoebus, which offered certainty and not to await an accord with the Defendant, which finally might not materialize, in spite of all Burstein's nice words. It cannot be said that by Burstein's *leter* statements of June 10th, the letter of May 20th found an explanation which would take away from it the withdrawal from the contract. According to the whole structure of the agreement, the matter was to be finished quickly, that is shown in the comparatively short period of

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

time to May 20th, which was stipulated for the question of the going into effect of the agreement which is not denied. Both parties agreed that the Plaintiff should see clearly, quickly, and be in a position to produce; as a counterweight, certain time limits and orders were given it for the production. The Defendant or its representative Burstein saw that a quick termination was of greatest interest to the Plaintiff; that was the meaning of the agreement. The delay and the demand to allow later changes, as expressed in the letter of May 20th, constituted a violation of the agreement by which, as Burstein could realize, material interests of the Plaintiff were affected.

Accordingly, there was a willful violation of the agreement on the part of the Defendant and thereby the conditions for the forfeiture of the contractual penalty were fulfilled.

In this connection it remains to discuss whether the agreement contained a logical uncertainty. It provides in Paragraph 13) that the Plaintiff has a right to withdraw from the agreement upon non-fulfillment of the obligation to pay; that would be a right of contractual rescission—exceeding the legal rescission provided in paragraph 326 of the Civil Code—and it is in accord with logic (and the prevailing opinion of law, Staud. to paragraph 340 II, 2) that upon declaring a rescission the right to a

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

contractual penalty ceases because it is connected with the agreement. Here a rescission was used. It is also provided in paragraph 13) that in any event the claim to a contractual penalty which has become due and to further damages is reserved. By this, the "declaration of withdrawal", which took place within the meaning of this agreement lost the usual character with the consequences of paragraphs 327, 346, Seq. Civil Code, it simply had the meaning of a refusal to perform, a termination of the obligations existing on the part of the party entitled to it. Inasmuch as a reason for the contractual penalty and the liability for damages on the part of the Defendant is not based on the failure to make the payment on May 20th, but in the withdrawal from the agreement, application of Paragraph 13) of the agreement with its right of "rescission", provided therein, is not in question, rather the contractual penalty of paragraph 12) is demanded by the party complying with the agreement against the party violating the agreement. The contractual penalty partakes of the character provided for in Paragraph 340 of the Civil Code, that is, is demanded instead of performance as minimum damage (Paragraph 340, Subd. II, Civil Code). The complaint asking for payment of 50,000 Rm, is therefore justified with the exception of interest, which can be granted only at the rate of two per cent above the Reichsbank discount as interest for

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)
delay. In this respect, the judgment appealed from is changed by the appeal of the Plaintiff.

IX) The cross-complaint for declaratory relief demands the declaration that the Plaintiff is not entitled to damages in excess of 50,000 M. The complaint for negative declaratory relief is admissible according to Paragraph 256, Code of Civil Procedure. It is justified.

In Principle the claim for damages of the Plaintiff is justified according to the foregoing reasons: It is based upon the contract and also upon Paragraph 326, Civil Code; setting of a time limit is not required, because later performance had no interest for the Plaintiff, in order not to lose its production for the year had in the meantime to conclude the Phoebus agreement, therefore could not fulfill the agreement with the Defendant which would have to be performed in the same time period. This decision had to be made on account of the violation of the agreement by the Defendant. The conditions of Paragraph 326 of the Civil Code apply therefore. The Defendant's allegation that the Plaintiff violated the agreement by the Phoebus contract and that it exercised its contractual rights only in order to get free and was better off with the Phoebus agreement is incorrect.

It cannot be ascertained, however, that the Plaintiff suffered damages in excess of 50,000 M. As an exhibit to the pleading of January 24, 1931, (II.124

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

of the file) a computation of damage has been made. The main item therein (100,000 M lost profit in re Deutsches Lichtspieltheater) is not justified, it does not appear how such profit was a consequence of the non-compliance by the Defendant. Furthermore, expenditures for upkeep of the office and preparations for the time prior to May 10, 1926, cannot be demanded. There are soliciting costs which are made with a view of making a desired contract, for which there is no obligation, and for which everybody assumes his own risk. They did not originate by reason of the non-fulfillment by the Defendant. The same applies to May's expenditures for the trip to Paris. Accordingly, so high a proportion of the calculated damages is unjustified that at the most about 20,000 M. are justified, that is, much less than 50,000 M. Lastly, if the contract (Paragraph 6c) speaks of a Guarantee of 60,000 Rm, which is to be paid by the Defendant, this only applies in case the film turned out well and was distributed by the Defendant successfully in the above-mentioned countries. That this would be the case, cannot be assumed as probable, it happens too often that films have so little box office attraction, that their distribution stops; an unconditional right to this 60,000 M was not granted to the Plaintiff by the agreement.

The Court also assumes this by reason of the fact that the Plaintiff itself does not mention this point

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

in its tabulation of damages. Furthermore, the Plaintiff averted the main damages by reason of the fact that it entered into the Phoebus agreement, which admittedly netted it a profit of 20,000 M.

The Defendant's appeal was therefore also justified and the cross-complaint had to be granted.

The decision regarding costs is based on paragraph 92, Code of Civil Procedure, the decision regarding temporary execution on Paragraphs 708, 713, Code of Civil Procedure.

(signed) VOSS

President of Senate Heuching and District Court of Appeal Judge Kleine are on vacation and therefore are unable to affix their signatures.

(signed) VOSS

[Seal of the District Court of Appeal, Berlin]

Certified

Berlin, Sept. 5, 1932

[Signature Illegible]

recording clerk of the District
Court of Appeal.

This judgment is final. Berlin, June 29, 1939.

The Clerk's Office of the Superior Court.

SCHIRN

Inspector of Justice

As Keeper of the Record of the Clerk's Office
of the Superior Court.

[Seal of the Superior Court Berlin.]

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Certified Copy.

VII 324/1932.

DR. PAUL DIENSTAG

DR. FERDINAND BANG

Attorneys.

Received February 28, 1933

Enclosures.

Jn the name of the Reich!

(Eagle)

Rendered:

February 3, 1933

(Signed) MERCK

Government Inspector as re-
corder of the office of the
court.

Jn re

Universal Pictures Corporation in New York
represented by the Board of Directors, defendant,
cross complainant, Respondent & appellant.

Counsel:

Attorney Counselor of Justice

DR. SCHROEMBGENS in Leipzig

versus

May-Film Corporation in Berlin, now in liquida-
tion, represented by its liquidator

Plaintiff, Cross-defendant, Respondent and
Appellant

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Counsel:

Attorney

DR. FUCHSLOCHER in Leipzig

the Supreme Court Civil Senate VII after oral hearing of February 3, 1933 by Supreme Court counselor Dr. Freiesleben as Presiding Judge. Supreme Court counselors Baron von Richthofen, Dr. Schack, Dr. Krueger and Oesterheld has adjudged:

The appeal and the joint appeal against the judgment of the District Court of Appeal at Berlin of July 27, 1932 are denied.

The costs of the appeal are assessed 2/5 to the defendant 3/5 to plaintiff.

According to the law.

Facts.

L. Burstein, businessman was the manager of a branch of the defendant in Berlin, which according to the German law had its own legal personality—a Limited Corporation—On May 10, 1926 Burstein was in Paris, whence he was to go to the United States for a temporary stay. After telegraphic announcement then a member of the board of directors of the plaintiff, film director Joe May of Berlin, went to Paris. According to the allegation of plaintiff an agreement was en-

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

tered into on the said day between it, represented by Joe May and the defendant which was represented in the negotiations by Burstein, its general representative. Accordingly they were to produce a film under the direction of Joe May based upon an original manuscript of a novel acquired by defendant from a third party "lustre of the emperor" under that title and to deliver it 3 months after the first day of filming provided certain conditions agreed upon in a written side agreement would have happened until May 20, 1926, to-wit:

1.) failure of formation of a finance committee for financing said film.

2.) failure to make certain agreements regarding the production of the film with this finance committee under guarantee of defendant.

3.) Confirmation of the written guarantee of the businessman Fellner undertaken in writing by Joe May in behalf of Fellner in Paris by affixing the signature of Fellner to the two documents issued in Paris, which were to be deposited after signature by Fellner at the branch office of defendant in Berlin. Provided these conditions had happened the defendant was to take over the distribution of the film "Lustre of the emperor" in Germany, France, Belgium and Switzerland for a period

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

of 7 years against payment of a fixed sum of 30,000 Marks and for the rest of the world under the condition, that the defendant would receive from the gross income of the rental to the plaintiff certain percentages, with a guaranteed minimum of 60,000 Marks, payable December 1, 1926.

Plaintiff alleges that the conditions under 1. 2. 3. happened and that therefore the agreement of May 20, 1926 went into effect; that the finance committee was not organized on May 20, 1926 or later, it therefore could not enter into the contemplated agreements. That the two documents regarding the guarantee of Fellner for the compliance of certain provisions of the contract and for prompt production of the film within the limit of the agreed price of 300,000 Marks including bonus, with reservations of "acts of God," were signed within the time limit by Fellner and deposited by Joe May at the branch office of the defendant in Berlin.

Regarding the consummation of the alleged agreement plaintiff refers to a document signed by Joe May and Burstein dated Paris May 10, 1926 which consists of several loose pages which have the signature of May but not of Burstein affixed in the margin. At the beginning this document is named "agreement" between May Film

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Corporation and Universal Film Corporation New York, branch office Berlin, represented by Mr. Burstein as general representative of Universal.

In paragraph 12 of the "agreement" it is stipulated that in case of violations of the contract the party violating the contract should pay the party conforming with the contract a contractual penalty, not subject to judicial reduction, in the amount of 50,000 Marks, without prejudice to further claims of damages. In paragraph 13 of the "agreement" it is stipulated that non-compliance with the terms of payment shall entitle the plaintiff to cancel the agreement with forfeiture of the payments made until then and that the right to the contractual penalty and further damages shall not be affected thereby.

The "agreement" was made in 2 copies, one of which was taken by Burstein to the United States, the other received by Joe May.

Claiming that defendant did not comply with its obligation to pay—the first instalment of 35,000 Marks,—up to May 20, 1926, but abrogated the contract by a letter of Burstein from New York on that day making compliance with the contract dependent upon further conditions, contrary to the agreement, plaintiff prays in this suit to order the defendant to pay the contractual penalty of 50,000 Reichsmarks with interest, reserving further claims for damages.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

It is not disputed that on June 1, 1926 plaintiff cabled to Burstein at New York after receipt of the letter of May 20, 1926 "Letter not acceptable. Since finance committee was not formed to the 20th, Paris agreement in effect. This agreement solely binding for us. Agreed instalment not paid we reserve all our rights May-Film." On June 7, 1926 plaintiff wrote to Burstein, who at that time was on the return trip from the United States to Paris that it was obliged to cancel the contract, because the agreed conditions were not complied with on his part and that it reserved all further rights.

Defendant prays that the complaint be denied and by way of cross-complaint asks that it be determined against the allegations of complainant, that by reason of non-compliance with the Paris agreement it sustained damages in the amount of 142,000 Reichsmark, determination that the plaintiff has no further claims for damages as alleged, because a binding agreement was not consummated and that the conditions did not happen, from which the right of plaintiff to demand the contractual penalty and damages depend, and because the plaintiff, which on June 4, 1926 entered into a more favorable contract of production with Phoebus Film Company violated the agreement itself and did not suffer any damages whatever.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

The Superior Court denied the complaint and cross-complaint. The District Court of Appeal upon appeal of both parties decided in favor of the complaint, denying further claims for interest and deciding according to the prayer in the cross-complaint. Defendant filed an appeal against this judgment which plaintiff joined after time for appeal had expired. Defendant prays that the judgment of the appellate court as far as it is against it be reversed and that it be decided according to its prayer in the appellate court. Plaintiff by joining the appeal again prays that the cross-complaint be denied. Both parties ask that the appeal of the opponent be denied.

Grounds for decision.

The appeal and the joint appeal are not justified.

10/21/36.

A. Revision.

I.

The Appellate Judge assumes that German Law will govern the case at bar because the agreement provided for German Jurisdiction and a German place of performance and payment. The revision appeal does not consider this correct because in the first place the question whether an agreement was consummated at all is in controversy, and the subjection of the parties to the German law depends upon that. The Appellate Court must

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

be upheld however in the result. When in negotiations about an agreement between a German and an American Company the agreement is contemplated in such a way that both parties are to perform the agreement in Germany and that controversies arising out of the agreement are to be decided by a German Court, the principle must be assumed, that according to the intention of the parties the question whether the agreement was consummated, must be subject to German Law. The defendant therefore cannot under the American law benefit by the fact that Burstein, in contrast to May did not sign the single pages of the main agreement with his name.

II.

The revision appeal is directed against the finding of the Appellate Court that condition No 3 of the side agreement of May 10, 1926 regarding the consummation of the main agreement has not been fulfilled. It claims violation of paragraphs 133, 157 Civil Code.

The claim is not justified.

The guarantee in question, drawn up in Paris, which was to be signed in Berlin by Fellner up to May 20, 1926 read as follows:

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

“To Universal Pictures Corporation
New York, Berlin
c/o Mr. Burstein.

In my own name as well as in the name of
Mr. Hermann Fellner by power of attorney
I declare the following:

In case we have to produce for you or a
company closely connected with you the film
“Lustres of the Emperor” we assume full
guarantee for the production within the lim-
its of the agreed price of 330,000 Marks—three
hundred thirty thousand Marks—including
bonus and the prompt delivery three months
after the first day of filming except for acts
of God.

Paris May 10, 1926

(Signed): JOE MAY.”

The Appellate Court found by inspection that
in this document the figure 330,000 was first
changed to 350,000 and changed back to 330,000.
That the letters in the word giving the amount
next to the figure 330,000 had also been changed.
That it may very well be possible and likely that
at first there was written three hundred thirty
thousand, that the part of the word “thirty” was
changed to “fifty” and later again changed back
to “thirty”. The Appellate Court finds that the
word written in letters had become illegible thereby,

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

also that the figure gave rise to confusion, particularly as besides it was made a statement:

300,000

10,000

20,000

20,000,

from which one could see how the sum of 350,000 Marks was arrived at. Since this statement was not crossed out, the document is ambiguous as to what figure is correct.

Regarding the changes, the Appellate Court finds that May did not have authority, to increase the production sum. In spite of that he had Fellner sign the declaration, after changing the figure to 350,000. That then on May 19, 1926 he turned over to Miss Valentin, employee of the defendant in the Berlin branch this and the other guarantee signed by Fellner (guarantee of fulfillment of the conditions 8, 9, 17 of the agreement). That he had the changed declaration returned to him on the same day or the next day and that he changed the figure back to 330,000. That Miss Valentin took over the document in this form. On May 18, May and Fellner cabled to Burstein at New York: "Fellner joins Paris May signature." From this it was apparent to Burstein that Fellner accepted the declaration of guarantee. That he could also hold Fellner responsible on account of the cable. That

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

the testimony of Fellner proved that he "had" given guarantee not only for the sum of 350,000 Marks but also for the sum of 330,000 Marks, that therefore Fellner was legally bound. Only the documentary evidence was not in the form provided for in the contract. The deposit of the guarantee at the Berlin branch gave the defendant the certainty that the condition of Fellners signature had been fulfilled. The defendant by reason of this deposit was obligated to make an advance payment of 25,000 Marks on account of the first instalment payable according to the agreement. That the signature of Fellner was sufficient to put the agreement of May 20, 1926 into effect, but that the document must not be changed in its text as it was to serve as evidence for the defendant, by which it would have been protected in any event if a law suit against Fellner had to be instituted. That therefore the condition that Fellner sign the guarantee, as drafted by consent of both parties, had not been fulfilled. That the condition was not such that formalities could not be overlooked as long as the guarantee had actually taken place and was not denied by Fellner. That Burstein had already been requested by cable from plaintiff of May 13, 1926 to instruct the Berlin branch regarding the payment of 25,000 Marks. That therefore he had good reason to satisfy himself regarding the correctness of the guarantee

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

to be deposited. Under certain conditions the 25,000 Marks were to be paid before May 20, 1926. In the interest of a logical execution of the agreement Burstein was under obligation to the other party of the agreement, to give the proper instructions to the Berlin office, which had to pass on the correctness of the documents, what was involved and how the declarations should have been, because the documents could not be sent to the United States in the short time. That according to the agreement the Berlin branch must be considered as empowered to make this check in behalf of Burstein while in the United States, because it could not be made by any other office, as the parties realized when entering into the agreement. That the local *employee* of Burstein, Miss Valentin who took care of the business of the Berlin branch, accepted the declaration in the present changed form, without objecting to it. That Burstein did not pay further attention to the form, although he noticed from May's actions that he (May) considered condition No 3 of the side agreement fulfilled.

That later when he returned to Europe he never objected to the form of Fellner's guarantee. That this conduct of Burstein could, according to faith and equity, only be so construed that the requirement of form was waived and that the defendant was satisfied with the lower surety which was avail-

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

able to it by the cable of May 18.— That therefore defendant could not raise any objection to the validity of the contract on account of non-compliance with condition No 3.

The revision appeal replies to these arguments that they overlook the fact that defendant's situation was worse by 20,000 Marks. If the defendant had held Fellner responsible on account of the cable of May 18, 1926 it would have faced not only the objection that it was a guarantee, the form of which had not been complied with, but also the objection that Fellner did not obligate himself by the cable to anything more than the declaration in the form in which he signed it when it was presented to him, that is to guarantee the production of the film at a cost of 350,000 Marks. If the Appellate Court presumed from the testimony of Fellner that he undertook the guarantee not only for the sum of 350,000, but also for 330,000 Marks, the defendant would not be bound by any later declaration of the witness, because the clear and unequivocal condition No 3 of the side agreement had not been fulfilled. That the finding of the Appellate Court that Miss Valentin accepted the declaration in the form submitted without objecting, has no legal effect. That Miss Valentin knew nothing about the agreement of May 10, 1926 and the wording of the declaration of guarantee as actually agreed upon.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

That it is erroneous that the Appellate Court drew conclusions from the fact that Burstein did not object to the form of the guarantee after his return to Europe. It should be noted that at the time when Burstein returned, plaintiff had already cancelled the agreement by its declaration of June 7, 1926, that even before, on June 4, 1926 it entered into the Phoebus agreement. Burstein's silence could therefore not be construed as approval of the document according to faith and equity.

These arguments of the revision appellant are at variance with the findings of fact of the Appellate Court in its essential points.

They mean that Fellner had knowledge of the change in the document by Joe May—350,000 to 330,000—before the end of May 20, 1926 and that he consented to it, also, that the corrected document was returned to the Berlin branch of the defendant on May 20, 1926—if not on May 19, 1926. Otherwise the Appellate Court could not have stated that Fellner “had” guaranteed not only for the sum of 350,000 but also for 330,000 Marks. The objection of the revision appellant that the substantive rights of the defendant were impaired to the extent of 20,000 Marks was not justified even in case Fellner's declaration was a guarantee and required written form according to paragraph 766 Civil Code because Fellner was not a “Commer-

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

cial man", paragraph 350 Commercial Code which waives the form requirement of paragraph 766 Civil Code under the conditions stated therein, and therefore did not apply to his declaration. Legal doubts regarding the validity of a guarantee in the declaration of Fellner cannot be deducted from the fact that he did not sign the changed document. (see: Supreme Court Decision of January 14, 1911 V 88/10 R G Z. Vol 57 p 68) As has previously been mentioned he consented to the change. From the point of view that May and Fellner had no longer the right to make disposition of the document which had been delivered, objections cannot be raised because Miss Valentin handed the document back to May and accepted it again after the change had been made without objecting to the change. There is no legal error in the finding of the Appellate Court that the Berlin branch was authorized to examine the documents. It could then hand the document to Joe May for corrections. The fact alone that the document was imperfect extrinsically and might give rise to doubt, as to which figure is correct, does not speak against the compliance with the legal requirement of written form. Such doubts occur frequently in documents which are difficult to read without affecting their validity. Such doubts would be easy to clear in view of the consent of Fellner which the Appellate Court found regarding the time in question.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

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(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

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(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

zation of the finance committee—It sees in the letter of Burstein of May 20, 1926 a repudiation of the agreement, a positive violation of the agreement. The Appellate Court does not pass on the **question of the necessity of setting a time limit**, only in discussing the cross-complaint. It denies it because the plaintiff had no interest in a later performance. That it had to accept the Phoebus agreement immediately in order not to lose its production for the year, although it could not perform both agreements.

The revision appellant maintains that Burstein's letter of May 20, 1926 could not be construed as a positive violation, a definite repudiation of the agreement. That the plaintiff apparently did not consider it as such, because it did not immediately, but only on June 7, 1926 cancel the agreement and then only for failure to make payment, which was excused by the Appellate Court. In any event an additional time limit should have been set, as it is incorrect that the interest of the plaintiff in the performance of the agreement had ceased on account of the letter of May 20, 1926, as was shown by the fact that the plaintiff cancelled the agreement only with the letter of June 7, 1926. That there was no reason why the defendant could not have set an additional time limit on June 1, 1926, even if only of a few days. That the Appellate Court confused Nos 12 and 13 of the agreement.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

That it overlooked that plaintiff was entitled to the contractual penalty under paragraph 12 only if it did not cancel but adhered to the agreement. That, furthermore, plaintiff violated the agreement by entering into the agreement with Phoebus on June 4, 1926, thus making it impossible for it, to perform the agreement with the defendant.

The Appellate Court applied paragraph 326 Civil Code to the contractual relations in question. There are no legal objections against that or against the finding of a positive violation of the agreement. The latter means not immaterial violations of an agreement, which consists neither of delay nor responsibility for impossibility of performance. Their basis is the consciousness that the agreement does not only require the promised performance but imposes on the debtor the duty not to do anything detrimental to and irreconcilable with the purpose of the agreement in the meaning of paragraph 242 Civil Code. If he violates the obligation not to do certain things he is liable for the resulting damage.

If he jeopardizes the purpose of the agreement in such a way that according to faith and equity the other party cannot be expected to stand by the agreement, the latter has the rights under paragraph 326 Civil Code, i.e. he can either cancel the agreement or declining acceptance of performance demand damages for non-performance.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

The Appellate Court which on the complaint had to decide about the right of plaintiff to demand the contractual penalty under No. 12 of the Paris agreement, had to examine whether the defendant violated the agreement and whether plaintiff complied with the agreement. It decided both questions affirmatively upon the facts. In doing so it adopted the principle developed in the jurisdiction of the Supreme Court that a refusal to perform declared before the time for performance puts into effect the rights of the other party given in paragraph 326 Civil Code that setting of an additional time limit or a warning is not necessary under all circumstances. The Appellate Court explains without violation of any principles of law, in view of the nature of the production situation of plaintiff and the special nature of its customers, why further waiting could not be imputed to plaintiff and why defendant could not expect such further wait. That is the meaning of its statements, that plaintiff had no further interest in the performance of the agreement. It took into consideration the wording of the letter of May 20, 1926 which outwardly was obliging, but decided that the letter in fact contained a renunciation of the Paris agreement. The Appellate Court does not consider a change of mind by plaintiff entirely impossible. This however does not contradict its findings. Such change of mind is conceivable with the change of human decisions

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

and does not exclude the renunciation of the agreement found by the Appellate Court. All of this is passing on facts of the case which cannot be attacked in the revision appeal with legal grounds. Attacks upon the procedural foundation cannot be made since the emergency order of June 14, 1932 went into effect as is recognized by the revision appellant.

The revision appeal claims that the letter from Burstein of May 20, 1926 did not constitute a renunciation of the agreement for the reason that Burstein in a postscriptum to this letter wrote:

“It is imperative to know immediately whether the Bratz Committee has been formed or not; otherwise I cannot make any decision, in which direction I have to inform myself, which I hope you will understand.”

and because May cabled to Burstein only after receipt of this letter on June 1, 1926 that the finance committee had not been formed to May 20. That Burstein knew only through this cable that the condition enumerated under No. 1 of the side agreement for the going into effect of the agreement had taken place.

This position of the revision appeal is not justified. It is true that the Appellate Court, as mentioned before, is inclined to excuse the non-payment of the first instalment on the ground that at that

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

time defendant did not know that the finance committee had not been formed. From this it is not to be deduced that it also considered the renunciation of the agreement in the letter of May 20, 1926 excused and denied the existence of a positive violation of the agreement. There is a difference between claiming a right to various changes of a consummated agreement—that is the understanding of the letter of May 20, 1926 by the Appellate Court,—and failing to make a payment, of which one assumes, the time for performance has not yet arrived. A contradiction in the statements of the Appellate Court is not to be found.

It must be conceded to the revision appellant that in principle is part of the essence of a positive violation of an agreement that the violator is conscious of the violation of the agreement. However, the finding of fact by the Appellate Court shows without doubt that this was the case. One cannot therefore concur with the revision appellant, when he tries to claim that the only reason for the “cancellation” of the agreement by the plaintiff was the failure to pay, which the Appellate Court considered as excused.

Neither can the revision appellant be successful with its claim that the plaintiff violated the agreement first by entering into the Phoebus agreement before its “cancellation” and therefore made it impossible to perform the Paris agreement. It is true

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

that the declaration of "cancellation" is to be found not in the cable of June 1, 1926 but in the letter of June 7, 1926 and that the Phoebus agreement according to the findings of the Appellate Court was entered into on June 4, 1926. However it is not true that the plaintiff violated the agreement with plaintiff (apparent mistake: defendant) by entering into the executory Phoebus-agreement. The plaintiff could, after being forsaken by the defendant make different arrangements for taking care of production and therefore enter into the Phoebus agreement before the formal declaration of "cancellation". Possibly it acted upon its own risk if the defendant before the declaration of "cancellation" had adhered to the agreement and complied with it. But this did not happen and therefore need not be discussed. Besides, the revision appellant overlooks the fact, that in a legal sense the plaintiff did not "cancel" the agreement, but that by refusing to accept performance it reserved its rights under the agreement including its right to the contractual penalty. This disposes also the claim of the revision appellant that the District Court of Appeal confused No's 12 and 13 of the Paris agreement and misinterpreted that under No. 12 plaintiff had the right to the contractual penalty only, if it did not "cancel". If the revision appellant means that the plaintiff could not demand the contractual penalty, even if it de-

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

manded damages for non-performance, but had to prove damages first, such claim is to be denied in view of the opposite interpretation by the Appellate Court which is possible and does not violate any legal provisions.

B. Joint revision appeal.

In principle the District Court of Appeal upholds the right of the plaintiff to damages. It states, however, that it cannot be ascertained, whether the plaintiff suffered damages in excess of the contractual penalty of 50,000 Reichsmark. In doing so the Appellate Court examines various items of the statement of damages in the amount of about 120,000 Reichsmark and denies them each separately for reasons which the joint revision appellant does not discuss. Then the Appellate Court goes on that the Paris agreement mentioned a guarantee of 60,000 Reichsmark in No. 6. This guarantee applied only in case the film was a success and would really be exhibited in the countries enumerated. That this would be the case, could not naturally be considered as probable. That it very frequently happened that films did not have drawing power so that their exhibition would be prevented. That an absolute right to the 60,000 Reichsmark was not to be conferred by the agreement. That the Court came to that conclusion also by the fact that the plaintiff itself did not mention this item in its statement of

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

damages. Furthermore the plaintiff averted the principal damage by entering into the Phoebus contract which admittedly brought a profit of 20,000 Reichsmark.

The joint revision appeal claims violation of the substantive law, particularly of paragraphs 133, 157 Civil Code. It claims that the guarantee undertaken in paragraph 6 c of the Paris agreement was not different from the guarantee for the producer customary in such film contracts, that it therefore would have to be paid without any further conditions having previously been complied with. That the opposite opinion of the District Court of Appeal is arbitrary and contrary to the principles of interpretation in civil law. That the opinion of the District Court of Appeal that the plaintiff averted the damage by entering into the Phoebus contract is also erroneous. That the District Court of Appeal overlooked the fact that the Phoebus contract was entered into by Joe May personally, not by the plaintiff.

The objections are not justified. If there is a controversy between the parties as to whether damages have been sustained and as to the amount of damages or of an interest to be compensated the court decides according to its own discretion taking into consideration all the circumstances. Such is the case at bar.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

manded damages for non-performance, but had to prove damages first, such claim is to be denied in view of the opposite interpretation by the Appellate Court which is possible and does not violate any legal provisions.

B. Joint revision appeal.

In principle the District Court of Appeal upholds the right of the plaintiff to damages. It states, however, that it cannot be ascertained, whether the plaintiff suffered damages in excess of the contractual penalty of 50,000 Reichsmark. In doing so the Appellate Court examines various items of the statement of damages in the amount of about 120,000 Reichsmark and denies them each separately for reasons which the joint revision appellant does not discuss. Then the Appellate Court goes on that the Paris agreement mentioned a guarantee of 60,000 Reichsmark in No. 6. This guarantee applied only in case the film was a success and would really be exhibited in the countries enumerated. That this would be the case, could not naturally be considered as probable. That it very frequently happened that films did not have drawing power so that their exhibition would be prevented. That an absolute right to the 60,000 Reichsmark was not to be conferred by the agreement. That the Court came to that conclusion also by the fact that the plaintiff itself did not mention this item in its statement of

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

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The objections are not justified. If there is a controversy between the parties as to whether damages have been sustained and as to the amount of damages or of an interest to be compensated the court decides according to its own discretion taking into consideration all the circumstances. Such is the case at bar.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Before the passage of the emergency order of June 14, 1932 the revision appeal could have raised such objections if it could prove at the same time that the Appellate Court misunderstood or exceeded the limits of its discretion. After the passage of the emergency order of June 14, 1932 an objection to the violation of paragraph 287 Code of Civil Procedure is not permissible any more. It cannot be raised either within the purview of paragraph 287 Code of Civil Procedure as a violation of the substantive law, e. g. the principles of interpretation.

C.

Revision appeal and joint revision appeal are therefore to be denied and are denied.

(Signed):

DR. FREIESLEBEN
FREIHERR von RICHTOFEN
SCHACK
KRUEGER
OSTERHELD

Issued

(Seal)

Signature

Government Inspector as recorder of the Court.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Total value of the subject matter in the revision
appeal 50,000 -|- 75,000 = 125,000 RM.

Of this amount is

1.) Revision of defendant 50,000 RM.

2.) Joint revision of plaintiff 75,000 RM.

taxed by order of February 3, 1933

I, the undersigned, do hereby certify that I am, at the date hereof, an official in the Clerk's Office, Department 100 of the Superior Court Berlin, and am the legal keeper of the official records of the aforesaid Superior Court, that I have compared the foregoing photostatic copies with the original records and documents in that certain action entitled Mayfilm A. G. Berlin W. Tauentzien Street 14

versus

Universal Pictures Corporation, New York, 730 Fifth Avenue, file No. 74.0.590/26, on file in this Court and now in my possession, and that the same are and each of them is, true and correct copies of the originals. That the judgment of the Superior Court Berlin dated March 4, 1930 has been superseded by the judgment of the District Court of Appeal of July 27, 1932, file No. 25.U.5849/30, a true and correct copy of which is included within the foregoing documents, and that this judgment has become and now is final. The Supreme Court in its decision of February 3, 1933 has rejected the re-

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

vision filed against this judgment, file No. VII. 324/1932. A true and correct copy of this judgment is included within the foregoing documents.

I certify to the correctness of this document by my signature and the attached seal of the Superior Court Berlin.

[Seal Superior Court Berlin]

Berlin, November 27, 1939.

SCHIRN

Inspector of Justice

as Keeper of the Record of
the Clerk's Office of the
Superior Court.

I, the undersigned, do hereby certify that I am, at the date hereof, the Chief Judge of the Superior Court Berlin. That at the date hereof, the 29th day of November 1939, Inspector of Justice Schirn is an official in the Clerk's Office of the aforesaid Superior Court Berlin and the legal keeper of the official records of the aforesaid Superior Court, that his signature to the foregoing certificate is genuine, that the seal of the Superior Court attached thereto is genuine and that he is the proper person to make the foregoing certification, that the attestation is in due form and that the same is in accordance with the laws of the land.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

I certify to the correctness of this document by my signature and the attached seal of the Superior Court Berlin.

Berlin, November 29, 1939.

[Seal Superior Court Berlin]

(Signed) SCHNITZER

The Chief Judge of the Superior Court

[Seal Superior Court Berlin.]

Cost Bill.

Q. By Mr. Blum: The judgment of the Kammergericht also is in that file? A. Yes, sir.

Q. What kind of a court is that?

Mr. Blum: Will you stipulate that is a court of general jurisdiction, having jurisdiction of this appeal?

Mr. Selvin: I think I already have; that there were such courts, and the courts which purported to render these judgments in fact existed and had jurisdiction of the subject matter.

M. Blum: Very well.

Mr. Selvin: That includes the Reichsgericht as well as the Kammergericht.

Q. By Mr. Blum: Dr. Gebhardt, have you a photostatic copy of another action?

A. I have.

(Testimony of H. A. Gebhardt.)

Q. And what is that?

A. A complaint——

Q. Just identify it and then I will show it to Mr. Selvin.

A. It is a suit brought by the firm of Bank for Foreign Commerce, a corporation at Berlin, against May Film Corporation in liquidation, also at Berlin. The complaint is dated March 30, 1934, and the filing stamp shows June 11, 1934, received by the court in Berlin. [20]

Q. Have you made a translation of that document? A. I have.

Q. Do you have a copy of it? A. I have.

Mr. Selvin: I will ask leave to ask one or two questions on voir dire when this judgment, which is now shown, is offered.

The Court: All right.

Mr. Blum: In order to show the court the purpose of this particular action, this appears to be an action between the Bank for Foreign Commerce and the May Film Corporation, by and through its liquidator. It appears that a dispute arose between the May Film Corporation and the Bank for Foreign Commerce as to the ownership of the judgment, which became final in Exhibit 1, the subject of this action. And in that action, after a due hearing upon the matter, the German court determined that the ownership of the judgment in question was in Joe May, individually, and not in the plaintiff

(Testimony of H. A. Gebhardt.)

corporation, and that the assignment from Joe May to the Bank for Foreign Commerce was valid. It is a necessary adjunct to our chain of title and it is a judgment in rem adjudicating the ownership and the validity of an assignment.

Mr. Selvin: Is it offered now?

The Court: Are you offering it now?

Mr. Blum: We offer it. [21]

Mr. Selvin: May I ask a question on voir dire?

The Court: Yes.

Q. By Mr. Selvin: Dr. Gebhardt, you have before you, I take it, what are the pleadings and the judgment in that action between the Bank for Foreign Commerce and the May Film Corporation?

A. That is right.

Q. Does that record show that Universal Pictures Corporation was a party to that action? In fact, it does not show that Universal Pictures Corporation was a party, does it? A. No.

Q. And it does not show that Universal Pictures Company, Inc., was a party to that action, does it? A. No.

Mr. Selvin: We object to the offer on the ground that no foundation has been laid to show that it is in any way binding upon the defendant, on the ground that it is *res inter alios acta*, upon the ground that it is a direct impeachment of one of the findings in the very judgment that the plaintiff relies upon and seeks to enforce here. Your

(Testimony of H. A. Gebhardt.)

Honor will see, upon examination of that judgment, that Joe May was not in fact the owner of the claim sued upon, but that May Film Corporation was the owner. One of the issues there was whether or not Joe May or May Film Corporation owned the claim. [22]

The Court: I think, Mr. Selvin, that the question you are raising, both as to the effect of a judgment which decides not only the ownership of a claim subsequent to the rendition of the judgment, but actually decides the ownership of a claim while in process of adjudication, is whether we are dealing here with an assignment of an ordinary claim after it has been reduced to judgment, or to the assignment while the judgment was being fought through various courts, which raises a legal issue which can only be determined after all the facts in the case are before the court. [25]

Nevertheless, I am inclined to think it should go [26] in at the present time in the determination of these questions, and the question of law should be left to a later date. And by ruling on it you are, of course, not waiving any rights. I am not jeopardizing any of your rights.

Mr. Selvin: May I add another objection? That is, that a judgment of a foreign court cannot be enforced, even under the doctrine of comity, against a party who was not given an opportunity to be heard and defend in an action in which the foreign

(Testimony of H. A. Gebhardt.)

judgment was rendered. That is the situation in this case. [27]

The Court: With these observations, gentlemen, I will overrule the objections and the document entitled "Gerichtsabschrift", dated May 30, 1934, together with the translation, will be received as Plaintiffs' Exhibits 3 and 4. The original will be Exhibit 3, and the translation will be Exhibit 4. [30]

(Testimony of H. A. Gebhardt.)

PLAINTIFFS' EXHIBIT No. 4

Dr. Walter Schmidt

Dr. Wilhelm Beutner

Attorneys at the District Court
of Appeal and Notaries

Dr. Friedrich Kempner

Dr. Heinz Pinner

Dr. Joachim Beutner

Attorneys of Superior Court and Notaries

Berlin W8

Markgrafen Street 46

Telephone Number A2

Flora 7541

COURT COPY

Berlin, May 30, 1934

Letter Box of Superior Court
and Municipal Building

June 11, 1934, 15 to 17

Single Judge Case

To the Superior Court, Berlin, Department for
Commercial Matters, Berlin C.2 Gruner Street.

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

Complaint of the firm of Bank for Foreign Commerce, a stock corporation at Berlin, Markgrafen Street 41, represented by its directors,
Plaintiff

Counsel: Attorneys Drs. Friedrich Kempner,
Heinz Pinner, Joachim Beutner,
Berlin W.8, Markgrafen Street, 46,

vs.

Mayfilm Corporation in Liquidation, In Berlin
Culmacher Street 3, represented by its
Liquidator, Kurt Hausdorff,
Defendant,

For Declaratory Relief.

Hearing July 23, 1934, 10 A. M. Court House, Gruner Street, Second Story, Second Floor, Room Number 19. Berlin, June 28, 1934. Superior Court, Department of Commercial Matters.

The President

[Signature Illegible]

As representatives of the plaintiff, we summon the defendant to an oral hearing in the case before the Superior Court, Berlin, Department of Commercial Matters, at a time to be set by the presiding Judge with the demand that it be represented at said hearing by an attorney admitted to the Superior Court, Berlin, and to advise any objections and evidence contrary to the allegations of the complaint

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

in writing to the court and to the counsel of the plaintiff.

We shall move:

1.) To declare that the claim asserted in the case of Mayfilm Corporation versus Universal 74.O.591.26, of Superior Court, 1, Berlin, in the amount of 50,000 R. M. with interest is for property of Joe May and not of the Mayfilm Corporation in liquidation, and that therefore the assignment made by May to the plaintiff is legally valid.

2.) To assess the cost of the suit to defendant.

3.) To issue temporary execution, if necessary upon giving security.

Reasons:

The defendant got into liquidation in February 1932. First Attorney Doctor Alexander Meier, Berlin, Friedrich Street, 225, was appointed liquidator. After his recall in December 1932, the business man, Kurt Hausdorff mentioned in the rubrum of the complaint was appointed.

Evidence:

The files of Registry of the Municipal Court, Berlin, reference to which is hereby requested.

In the year 1926, the defendant filed suit against Universal Pictures Corporation, New York, in the files 74.O.590/26 of the Superior Court I Berlin, for the payment of 50,000 R. M. with interest and costs. By judgment of the District Court of Appeal

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

of July 29, 1932, Universal was ordered to pay the the amount demanded; Revision was rejected by judgment of the Supreme Court of February 7, 1933.

The liquidator and some creditors of the defendant take the position that this claim belongs to the assets of the corporation and should therefore be distributed pro rata among the creditors with the rest of the liquidation assets. This is not correct, as it is a claim of a former member of the board of directors of the defendant, film director Joe May.

In the year 1930, the business of the defendant was almost at a standstill. The nominal capital was at the time 200,000 R. M. In order to start production again, the then only shareholder of the defendant Joe May and the business man Julius Aussenberg, entered into an agreement that the capital stock be reduced to one-half and that Aussenberg simultaneously should purchase from Joe May 50,000 R. M. shares of stock at a purchase price of 45,000 R. M. At the same time it was agreed that Joe May should acquire with these 45,000 R. M. the assets of the defendant which were not necessary to start film production again.

In order to prove this agreement, it was incorporated in paragraph 3 of the association agreement of August 29, 1930, as follows:

“According to the last balance of June 30, 1930, Mayfilm has no debts outside of the cap-

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

ital stock and 8751.44 R. M. debts to the bank and assets of 113,755.54 R. M. Of these assets a portion with a value of 60,004.10 R. M. serve the purpose of new production. The other assets consist in the interests of the Mayfilm G.m.b.H. Filmstadt Woltersdorf Grundstuecks G.m.b.H. doubtful claims, manuscripts, etc. It has been determined by an intermediate balance of August 15, 1930, which of the assets were purchased and are of importance for new production. Those assets remain to the Mayfilm. The other assets are acquired from Mayfilm by by May upon payment of 45,000 R. M. (forty five thousand Reichsmark). The Mayfilm therefore had assets of 105,004.10 R. M. namely, 45,000 R. M. cash, and 60,000.10 R. M. purchases for new production.

The trial balance of August 15th is to be made accordingly and at the same time shall be considered the opening balance of Mayfilm which is again actively working."

This agreement was then executed. Joe May paid 45,000 R. M. to defendant and then received as consideration from the then director of the defendant, Miss Johanna Loewenstein, the assets not necessary for new production. This settlement was confirmed by the defendant at the time, also by reason of the fact that Miss Johanna Loewenstein as director

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

of the defendant, signed the balance of June 30, 1930, which did not contain the assets transferred to Joe May, after submitting it to the special meeting of August 28, 1930.

Evidence:

Intermediary balance of August 15, 1930, deposited in the Clerk's Office.

Among the assets which were not necessary for new production, was the above mentioned claim against Universal. There is involved the enforcement of a contractual penalty incurred in the year 1926. This claim then was assigned to Joe May.

Evidence:

Testimony of Johanna Loewenstein, at present at 1760 Courtney Avenue, Hollywood, California.

At the time of the agreement with Aussenberg, the chances of the law suit against Universal were very uncertain, inasmuch as the law suit had been lost by the defendants in the first instance. The value of this claim, was therefore considered not very high, so for this reason also, there were no objections to assign this claim to Joe May. Since then, Joe May personally paid all the costs of the law suit.

Evidence:

Testimony of the former attorney, Dr. Dientag, Amsterdam, Chopin Street 27, with Kolbe, Johanna Loewenstein, the vouchers and receipts in the court file of Superior Court 1 in Berlin, 74.0.590/26. All

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

parties interested were in complete accord that May should be the owner of this claim. Technically, in the interests of the procedure, the defendant was to carry on the law suit.

Evidence:

Testimony of the business man, Julius Aussenberg, Prag. 11, Hotel Alcron, Stepanska ul. 38.

As further evidence for the premises, I refer to the court file of Superior Court 1 Berlin, 221.Q.197.32, in which, upon motion of Joe May, without oral hearing, a restraining order was granted against the defendant, which restrained it from asserting that the claim against Universal belonged to it. It is requested that these court files be adduced and that the evidence produced therein be considered a part of this complaint.

Joe May assigned to plaintiff this claim against Universal in the sum of 50,000 R. M. on May 30, 1932.

Evidence:

Copy of assignment of May 30, 1932, is deposited in the Clerk's office. The foregoing complaint is necessary for the reason that the defendant, represented by its liquidator, refuses to admit that the claim against Universal does not belong to defendant, but to Joe May personally.

Copy filed.

(Signed) DR. PINNER

Attorney

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

(Copy)

Exhibit to Agreement of August 29, 30.

Balance per 8/15, 1930

Capital Stock	45,000.—	
Assets		Liabilities
Bank Balance:		
Production 1930/31		
Manuscript Film I.....	13,500.—	
“ “ II.....	5,500.—	
Music Film I.....	1,795.60	
Advances Film I.....	4,754.10	
“ “ II.....	5,282.06	
Salaries and wages.....	5,921.—	
General Expenses	8,250.34	
Organization and trips		
(Paris, London and		
United States)	15,000.—	60,004.10
Loss Saldo, July 1,		
1930	94,995.90	
	200,000.—	200,000.—

ASSIGNMENT

In the Court files of the Superior Court 1 Berlin 74.O.590/26, Mayfilm Corporation, Berlin makes a claim against the Universal Pictures Corporation, New York, in the amount of 50,000 R. M. (fifty thousand Reichsmark) under reservation of further claims. Mayfilm Corporation lost the case in the first instance. Appeal against this judgment was filed. The appeal is pending at the present time in

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)
the District Court of Appeal, file Number 25.U. 5849/30. The claim of Mayfilm Corporation against Universal Pictures Corporation was reserved to me personally in the partnership agreement between myself and Director Julius Aussenberg of August 24, 1930. This fact was expressly recognized by the Committee of creditors of Mayfilm Corporation in the negotiations with it.

With these premises, I hereby assign to the Bank for Foreign Commerce, a corporation at Berlin W. 56 Markgrafen Street, 41 ab, the claim involved in this lawsuit against Universal Pictures Corporation in the amount of R. M. 50,000 (fifty thousand Reichsmark) with interest in the amount to be allowed in the judgment and reservation of further claims.

Berlin, May 30, 1932

(Signed) JOE MAY

Dr. Walter Schmidt

Dr. Wilhelm Beutner

Attorneys at the District

Court of Appeals and Notaries

Dr. Friedrich Kempner

Dr. Heinz Pinner

Dr. Joachim Beutner

Attorneys of Superior Court
and Notaries

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

Berlin W8

Markgrafen Street 46

Telephone Number A2

Flora 7541

(Court Copy)

Berlin, July 31, 1934

In the matter of Bank for Foreign

Commerce, a Corporation,

vs.

Mayfilm Corporation, in liquidation.

405.O.113/1934

We hereby correct the title of the case in this, that the liquidator of defendant, the business man, Kurt Hausdorff is residing at Barcelona, Spain, Calle de Avino 17.

We summon the defendant before the Superior Court, Berlin, Department 5, for commercial matters, to a hearing to be set by the court with the demand to appoint an attorney admitted to this court as its representative and to advise in writing as to any objections with offer of proof.

Copy is deposited.

The Attorneys

Dr. Friedrich Kempner,

Dr. Heinz Pinner and

Dr. Joachim Beutner

By DR. HEINZ PINNER.

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

To the Superior Court, Berlin,
Department 5, for Commercial
Matters.

Dr. Friedrich Kempner

Dr. Heinz Pinner

Dr. Joachim Beutner

Attorneys of Superior Court
and Notaries

Berlin W8

Markgrafen Street 46

Telephone Number A2

Flora 7541

(Court Copy)

Berlin, August 27, 1934

In the Matter of Bank for
Foreign Commerce, a corporation
versus

Mayfilm Corporation, in
liquidation.

405.O.113.1934

A typographical error in the complaint is corrected in this that on page 3, line 16, on the bottom, it should read, Mayfilm G.m.b.H. instead of Mayfilm Corporation.

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

Copy of this pleading has been deposited with
the Clerk's office.

The Attorneys,
DR. FRIEDRICH KEMPNER,
DR. HEINZ PINNER and
DR. JOACHIM BEUTNER.

Per DR. HEINZ PINNER.

To the Superior Court, Berlin,
Department for Commercial Matters.

Dr. Jr. John A. Fagg,
Attorney.

Berlin W. September 26, 1934
Wittenberg Place 1
B4 Bavaria 1053

In the matter of Bank for Foreign
Commerce,

versus

Mayfilm G.m.b.H. in Liquidation
405.O.113/34

I represent the defendant. I shall move first to
reject the complaint. Second, in case of an ad-
verse judgment to allow defendant to deposit se-
curity.

It is denied that the claim against Universal be-
longs to Mr. Joe May personally. It belongs to the
assets of Mayfilm G.m.b.H. in liquidation.

It is correct that a portion of the former assets

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

of Mayfilm G.m.b.H. were assigned to Mr. Joe May. However, the claim in question was not included. As plaintiff states, the law suit against Universal was conducted even after liquidation and after the agreement regarding transfer of a portion of the assets by the defendant without any change. As plaintiff states, the agreement in question was dated August 29, 1930. The suit against Universal was decided by the District Court of Appeal in July 1932, and by the Supreme Court in February 1933. Reference to those court files is made. These files are not accessible to the present liquidator of the defendant. According to his information, these court files will show that the claim in question belongs to the defendant. It must be denied for lack of information and belief that an agreement was made between defendant and Mr. Joe May that the defendant should continue this suit only technically, while the parties agreed that the claim would not belong to Mr. Joe May. It must also be denied upon lack of information and belief that Mr. Joe May alone paid the cost of the lawsuit.

(Signed) FAGG,

Attorney.

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

Dr. Friedrich Kempner

Dr. Heinz Pinner

Dr. Joachim Beutner

Attorneys at the Superior Court
and Notaries

Berlin W 8

Markgrafen Street 46

Telephone Number A2

Flora 7541

(Court Copy)

Berlin, September 28, 1934

In the matter of Bank for

Foreign Commerce

versus

Mayfilm Corporation,

in liquidation.

405.O.113.1934

Very Urgent Hearing on October 1, 1934

The following reply is made to defendants' pleading of September 26, 1934:

I.

Attention is called to an error in typing in opponent's pleading. In the heading of his pleading, defendant is named, as Mayfilm G.m.b.H. in Liquidation, while in reality, not Mayfilm G.m.b.H. which is in existence, but not in liquidation is a defendant, but Mayfilm corporation in liquidation. In

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

order to avoid mistakes, it is requested that the typographical error in opponent's pleading be corrected.

II.

Defendant denies that assignor, May could legally assign to plaintiff the claim in question, because this claim did not belong to him. Regarding this denial, reference is made to the court files, 221.Q.197/32 of the former Superior Court 1 Berlin, to which reference was made in the complaint. In these files of restraining order in which the defendant was restrained from claiming that the claim against Universal belonged to defendant, evidence is contained which makes this plain denial of defendant legally immaterial. If defendant which did not make any objections to the restraining order now makes a statement which the restraining order forbade that the claim against Universal belongs to defendant and not to Mr. May and therefore denies the allegations, defendant would have to state in detail what evidence can be produced against the evidence submitted previously. If defendant is unwilling or unable to do so, the denial is immaterial and does not require taking any further testimony after the files regarding the restraining order have been filed by reference.

III.

As a matter of precaution, the following is stated:
Plaintiff has offered proof in case defendant

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

should deny Mr. May's right to the assigned claim by filing intermediary balance of August 15, 1930, and referred to the testimony of the then director of the defendant, Miss Loewenstein. If the court should consider defendant's denial sufficient, or if this can substantiate its denial so that it be considered sufficient, evidence may be taken by taking the deposition of Miss Loewenstein.

Defendant wants to prove the lack of authority of Mr. May to the claim by the court files, Mayfilm Corporation versus Universal, particularly by the judgments rendered therein by the District Court of Appeal and the Supreme Court. In the conclusions of law of the Supreme Court Judgment, the question of the right of the then plaintiff, Mayfilm Corporation, to the claim was not mentioned at all, because the then defendant, Universal, did not question before the Supreme Court plaintiff's authority to sue. As far as the District Court of Appeal Judgment is concerned, the portion of the judgment in point is hereby repeated literally in the interest of a speedy trial.

"Plaintiff is entitled to sue upon the claim in question. The defendant, in order to prove that this is not the case, relies on the testimony of the witness Joe May according to which he as a stockholder, made an agreement with another stockholder, Aussenberg, regarding the corporation and agreed that among other assets of

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

the corporation, the claim sued upon belong to him, while the law suit was to be conducted further by the corporation. May gave, according to his statement, a guarantee to the liquidation creditors in the amount of 40,000 R.M. He also states that he paid 45,000 R.M. On the other hand, he states that he would not be released from his guarantee even if the result of the present law suit would be taken into the liquidation assets. From this testimony, it must be assumed that the claim was not really assigned so that it passed from the corporation to one of the associates, but that an agreement was made between the associates and after completion of the liquidation, the present assets should be turned over to May after liquidation is completed. It is supposed to have been expressly agreed that the corporation was to continue in conducting the law suit and accordingly the collection of the judgment. Plaintiff now is a corporation, represented by the liquidator. As far as he is concerned, a distribution of the assets of the corporation among the associates, before paying debts of the association, would be invalid because the associates are not authorized to distribute among themselves the assets without paying the debts of the association."

The above cited statements of the District Court of Appeal are based principally upon the testimony

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

of the witness, May. This testimony has undoubtedly been wrongfully interpreted by the District Court of Appeal. The question is immaterial, however, because naturally, the conclusions of the judgment of the District Court of Appeal did not become final, and that the Superior Court, which is now trying this case anew, has to examine the question of the right to the claim. Furthermore, while at present the question of who owns the claims has been stated to the Superior Court in the complaint in detail, all these facts were unknown to the District Court of Appeal. Neither in writing nor orally were they argued there, because the objections of plaintiff's right to the claim were mentioned only in the very last stages of the lawsuit, and were so superficially mentioned in the last oral hearing, that at least the former attorney of the former plaintiff, now the defendant, did not figure that statements as they were made later would be given in the judgment. The court files, 221.Q.197/32 of the former Superior Court Number 1, to which reference has been made repeatedly, show that the defendant did not consider the statements of the District Court of Appeal of any moment, but considered them as incorrect, since to this day the defendant, represented by its former Liquidator, Dr. Meyer, nor by its present Liquidator, has raised any objections. Defendant rightly assumed that these statements of the District Court of Appeal, which

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

were merely dicta, could not be used against the present plaintiff or Mr. May, because the factual conditions, upon which the statements of the District Court of Appeal are based, are not in existence.

The District Court of Appeal assumes that the agreements made with the defendant were those of a corporation liquidation, and that the corporation debts had to be paid first. As far as the first premise is concerned, the District Court of Appeal overlooks the fact that the Mayfilm Corporation was not in liquidation at the time when the agreement in question was made, to-wit, in the year 1930. At the time when the agreements between the stockholder, May and Aussenberg were made, and the directors of the corporation agreed that upon payment of 45,000 Marks a number of assets be assigned to the stockholder, May, the corporation was alive and nobody thought of its liquidation. That the business at the time was inactive has nothing to do with the question whether it was in liquidation. The very fact of the agreement between May-Aussenberg, proves that one considered re-opening the business and in fact, business was re-opened to a considerable degree.

In February 1932, the corporation agreed to liquidate and Dr. Meyer was appointed Liquidator in 1932. Defendant can not deny that. The correctness of these statements appears from the files of the

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

Register, which have been requested by my pleading of February 22, 1934 to be present at the hearing. The law is clear that any corporation which is alive and not in liquidation can enter into business deals with its stockholders as well as third persons, and that it can sell assets for valuable consideration to them.

If the District Court of Appeal speaks of a distribution of the assets among stockholders, this is a mistake as to the actual facts. The distribution to stockholders takes place, if assets are turned over to stockholders, either without any consideration, or upon transfer of stock, not however, if sales take place upon cash payment. Furthermore, the logical conclusion of the opinion of the District Court of Appeal could never be that the assets do not belong to the stockholder, but the consequences could at most be the possibility of a claim against the officers of the corporation for violation of their duties.

The further consideration of the District Court of Appeal that it required the payments of the debts of the corporation is based upon a wrong factual assumption, to-wit: That there were debts. The debts of the defendant originated in the year 1932. In the year 1930, the defendant, whose business, as was mentioned before, was at a standstill, was a corporation which had nothing but assets. Reference is made in this connection to paragraph III of the agreement of August 29, 1930, which has been cited in the complaint. The statements of the

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

District Court of Appeal are wrong for the further reason that, even if defendant had been in liquidation at the time the agreement was made, the law is that a distribution of the assets among the stockholders before payment of the debts may be made with the consent of the creditors. (See Staub-Pinner, paragraph 301, Exp. 7). This applies more so if there aren't any creditors at all who could be damaged.

The foregoing shows that reference to the judgment of the District Court of Appeal avails nothing to the defendant, because the District Court of Appeal started in its conclusions from wrong premises by reason of lack of sufficient information of facts.

IV.

Finally, defendant denies the existence of the understanding that in spite of the assignment of the claim to Mr. May, defendant was to continue the lawsuit. Our opinion is that this allegation in the answer is not material to the decision of this case. Material is only to whom the claim actually belongs; it is of very little importance if somebody else was allowed to enforce the claim.

For the correctness of our statements, testimony of Mr. Aussenberg is offered.

V.

For the information of the court, it may be mentioned that as has been stated before, defendant

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

never denied Mr. May's right to the claim. If defendant does so now, the reason for this is the attitude of the creditors or the committee of creditors. In a meeting in January 1932, they admitted to the attorney of defendant, Dr. Dienstag, that the claim belongs to Mr. May.

Evidence:

Testimony of Dr. Dienstag:

When the creditors committee in August 1932, heard of the casual remark of the District Court of Appeal cited above, he declared that the statements formerly made by him were not binding and that he adopted the opinion of the District Court of Appeal which was evidently based on false factual premises. This was the reason why the Liquidator of the defendant now also denies the claim.

Evidence as above.

(Signed) DR. PINNER,
Attorney.

Superior Court Berlin.

February 25, 1935

It is requested to give the
following number in all
communications.

No. 405.O.113.34

This judgment has become
final. 4/10/35.

Koch, Inspector of Justice.

In the name of the German People!

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

Rendered: February 25, 1935.

(Signed) KIEFER, J.A.,

Court employee as recorder
of the Court.

In the case of the firm of Bank for Foreign Commerce a stock Corporation at Berlin W.8, Markgrafen Street 41, represented by its directors, Plaintiff.

Counsel: Attorneys Dr's Friedrich Kempner,
Heinz Pinner, Joachim Beutner, Berlin W.
8, Markgrafen Street 46,

versus

Mayfilm Corporation in liquidation at Berlin,
Kurfuerstendamm 108/109 with drescher,
represented by its liquidator, Kurt Hausdorff at present at Barcelona (Spain), Defendant.

Counsel: Attorney Dr. John A. Fagg, Berlin, Wittenberg Place 1.

The 5th Department for commercial matters of the Superior Court Berlin after trial on February 11, 1935 by Superior Court director Ronneberg and commercial judges Lettner and Biermann has adjudged:

I. It is hereby decided that the claim asserted in the case of Mayfilm Corporation versus Universal—74.O.591.26 of Superior Court I

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

Berlin in the amount of 50,000.00 R.M. with interest is the property of Mr. Joe May personally and not of the Mayfilm Corporation in liquidation and that therefore the assignment made by May to the plaintiff is legally valid.

II. Costs of the suit are assessed to defendant.

Facts:

The defendant, Mayfilm Corporation in liquidation obtained in the files 74.O.591.26. against the Universal Pictures Corporation in New York, a judgment in the District Court of Appeal of July 29, 1932 for the payment of 50,000.00 R. M. with interest. Revision against this judgment was rejected by the Supreme Court.

The plaintiff filed suit against the defendant to declare that this claim belonged to its former director of the corporation, the film-director Joe May personally and that accordingly the assignment made by Joe May to the plaintiff Bank is valid. Plaintiff alleges: That on August 29, 1930 an agreement was made between the business man Julius Aussenberg and the then only stockholder of the defendant Joe May to the effect, that Aussenberg should acquire shares of stock of the Corporation of the nominal value of 50,000.00 R.M. for 45,000.00 R.M. and that Joe May should receive for these 45,000 R.M. the assets of the Corporation, which were not necessary for the beginning of new film

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

production. That is conformance with this stipulation, Miss Johanna Loewenstein as director of the defendant assigned the claim against Universal to Joe May. That this claim belonged to the assets which were to be transferred to Joe May.

The defendant prays:

Denial of the suit, if necessary the right to deposit security.

Defendant denies the allegations of the complaint according to its pleading of September 26, 1934.

For particulars of the allegations of the parties reference is made to the contents of their pleadings.

According to the order to take testimony of October 1, 1934 testimony has been taken regarding the allegations of the complaint. Johanna Loewenstein in Hollywood, California gave her deposition under oath before the notary, Karl L. Ratzer in Los Angeles, California, U. S. A., who was authorized by commission, on December 27, 1934. Reference is made to the minutes of the notary.

Grounds for Decision.

The witness testified at her deposition in Los Angeles as follows: It is correct that there was assigned to the Film Director, John (Joe) May, in conformance with the agreement with the business man, Julius Aussenberg and the intermediary bal-

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

ance of the defendant of August 15, 1930, in consideration of the payment of 45,000.00 Reichsmark, the claim against Universal Pictures Corporation, New York, in the amount of 50,000.00 Reichsmark. Messrs. Joe May and Julius Aussenberg entered into the partnership agreement which was signed at the annual meeting of the Mayfilm Corporation on August 29, 1930. In this partnership agreement it was stipulated that all the old assets of the Mayfilm Corporation, which did not refer to new production, would be assigned to Mr. Joe May upon payment of 45,000.00 Reichsmark. I remember that among these assets the claim against Universal Pictures Corporation for payment of 50,000.00 Reichsmark contractual penalty was included. At that time, the lawsuit had been lost in the Lower Court, therefore one did not estimate the value of this claim very high and as director of the Corporation, I had no objection to signing the intermediary balance of August 15, 1930. Therefore I also agreed to the contents of the partnership agreement between May and Aussenberg.

According to this intermediate balance, Joe May paid to Mayfilm Corporation 45,000.00 Reichsmark and was assigned to him in consideration the assets, including the lawsuit against Universal Pictures Corporation. Only as a matter of form the lawsuit was continued in the name of the Mayfilm Corporation. In spite of the fact that the lawsuit

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

was continued under the old title, the claim belonged to Joe May, who, from this time on had to bear the costs and give the information regarding the appeal and the later revision to the Supreme Court.

I know these facts, for the reason that after August 29, 1930 I had charge of the finances of the Mayfilm Corporation and I know that no expenses were paid for the lawsuit after August 29, 1930 until the liquidation of the Mayfilm Corporation. Joe May continued the lawsuit alone, from August 29, 1930 on.

Proof for the allegation of the complaint has been made by this testimony, so that according to paragraph 256 of the Code of Civil Procedure the prayer for declaratory relief must be granted.

According to paragraph 91 of the Code of Civil Procedure defendant is ordered to pay the costs of suit. Judgment is given accordingly.

(Signed): RONNEBERG
LETTNER
BIERMANN

405.O.113/34

October 9, 1934

ORDER TO TAKE TESTIMONY

Testimony is to be taken regarding plaintiff's allegation.

I. That there was assigned to the film Director, Joe May, in conformance with the agreement with the business man, Julius Aussenberg, and the in-

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

intermediary balance of the defendant of August 15, 1930 in consideration of the payment of 45,000 R.M. the claim against Universal Pictures Corporation, New York, in the amount of 50,000 R. M., and that the lawsuit regarding this claim against Universal was only continued in the name of defendant, but that from the time of the assignment, it was financed and conducted by May, by taking the deposition of Johanna Leowenstein at Hollywood, California, United States of America, 1760 Courtney Avenue, named as witness by the plaintiff.

II. That the German Consul at Hollywood, shall be requested to have the deposition taken.

III. Taking of the deposition shall be dependent upon payment of an advance of costs by the plaintiff in the amount of 50 R.M. and of an advance for the expenses caused by the air mail.

V. The date for continuance of the oral hearing is reserved.

Berlin, October 1, 1934.

Superior Court, Department 5, For Commercial Matters.

(Signed) RONNEBERG and BIERMAN

The Superior Court

Department 5 for Commercial Matters.

File Number 405.O.113/34

(This number must be mentioned with
all documents.)

1 enclosure.

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

Berlin C. 2, November 8, 1934

Neue Friedrich Street 15-16

In the Name of the German People!

The Superior Court, Berlin, to

Mr. Karl L. Ratzer, Notary at

Los Angeles, California:

You are hereby notified that the above-named court has appointed you commissioner and has authorized you by these presents:

To take the deposition of Miss Johanna Loewenstein, under oath, residing at Hollywood, California, 1760 Courtney Avenue, within the State of California, in the lawsuit pending before the said Superior Court of firm of Bank for Foreign Commerce, a stock corporation, at Berlin, W 8, Markgrafen Street, 46, represented by its directors, plaintiff, counsel, attorneys, Drs. Friedrich Kempner, Heinz Pinner, Joachim Beutner, Berlin W 8, Markgrafen Street, 46, versus Mayfilm Corporation in liquidation, at Berlin, Kurfurstendamm 108/109 at Drescher, represented by its Liquidator, the business man, Kurt Hausdorff, defendant, counsel attorney, Dr. Jur. John A. Fagg, Berlin W, Wittenberg Place 1, as a witness, in conformance with the order to take testimony of October 6, 1934, pursuant to the following instructions. (See statement below), and to ask the following questions:

1. What is your name, first name, your age, occupation, residence?

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

2. Do you know the parties and since when? Are you related or related by marriage to one of its managers?

3. What do you know about the allegation of the plaintiff that there was assigned to the Film Director, Joe May, in conformance with the agreement with the business man, Julius Ausenberg, and the intermediary balance of the defendant of August 15, 1930, in consideration of the payment of 45,000 R. M. the claim against Universal Pictures Corporation, New York, in the amount of 50,000 R. M. and that the lawsuit regarding this claim against Universal was only continued in the name of defendant, but that from the time of the assignment, it was financed and conducted by May.

4. Do you know anything else regarding the questions in this lawsuit which you have not said as yet? Please make complete statement.

According to German law, the parties and their legally authorized representatives have the right to be present at the deposition of the witness.

It is requested to advise the date of the hearing in time so that the parties may be notified from here.

For a better understanding of the questions, the following statement is made:

The defendant entered into liquidation in

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

February 1932. In the year 1926, defendant filed a suit in the court files 74.O.590/26, of the Superior Court 1 Berlin, against Universal Pictures Corporation, New York, for the payment of 50,000 R. M. with interest and costs. (See order to take testimony 1); by judgment of the District Court of Appeal of July 28, 1932, Universal was ordered to pay the amount claimed; its revision was rejected by judgment of the Supreme Court of February 3, 1933. Plaintiff alleges that this claim did not belong to the liquidation assets, but belonged to the Film Director, Joe May, and was assigned to plaintiff. Plaintiff filed a suit for declaratory relief to this effect against the defendant. Copy of affidavit of the witness, Johanna Loewenstein of December 3, 1932, which was filed in the matter of restraining order, May vs. Mayfilm Corporation, 221.Q.197.32, Superior Court, 1, Berlin, is attached hereto.

The Presiding Judge Ronneberg,
Director of the Superior Court.

Seal of the Prussian Superior Court,
Berlin.

Transcript at Los Angeles, California, United States of America, in the office of the Attorneys, Ratzer, Bridge & Gebhardt, before the Notary Karl L. Ratzer, on December 27, 1934; clerk, Marta Schacht.

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

In the matter of the firm "Bank for Foreign Commerce Corporation at Berlin," plaintiff, vs. "Mayfilm Corporation" in Liquidation at Berlin, there appeared before the undersigned Notary, appointed by Commerce of the Superior Court, Berlin, Department 5, for Commercial Matters of November 8, 1934, as a witness, Miss Johanna Loewenstein.

According to cable of the above named Superior Court, Berlin, to the German Consulate at Los Angeles, California, the parties waive notice of hearing and agree to the taking of the deposition of the witness on the present day.

The witness was advised as to the meaning of the oath and the consequences of perjury, and was advised that the oath also related to the answer to the general questions.

Thereupon, the witness was asked the following questions, to which she replied as followed:

1st. What is your name, first name, your age, occupation, residence?

Answer: Loewenstein, Johanna; Secretary, 1760 Courtney *Aven*, Los Angeles, California.

2nd: Do you know the parties, and since when? Are you related or related by marriage to one of its managers?

Answer: I know the Mayfilm Corporation from its inception since about 1923; I know the bank for Foreign Commerce for a number of

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

years, to the best of my recollection, about six or seven years. I am neither related, nor related by marriage to the managers of either party.

3rd: What do you know about the allegation of the plaintiff that there was assigned to the Film Director, Joe May, in conformance with the agreement with the business man, Julius Aussenberg, and the intermediary balance of the defendant of August 15, 1930, in consideration of the payment of 45,000 Reichsmark, the claim against Universal Pictures, New York, in the amount of 50,000 Reichsmark, and that the lawsuit regarding this claim against Universal was only continued in the name of defendant, but that from the time of the assignment, it was financed and conducted by May?

Answer: It is correct, that there was assigned to the Film Director, John (Joe) May, in conformance with the agreement with the business man, Julius Aussenberg, and the intermediary balance of the defendant of August 15, 1930, in consideration of the payment of 45,000 Reichsmark, the claim against Universal Pictures Corporation, New York, in the amount of 50,000 Reichsmark.

Messrs. Joe May and Julius Aussenberg entered into a partnership agreement which was signed at the annual meeting of the Mayfilm Corporation of August 29, 1930. In this partnership agreement, it was stipulated that all

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

the old assets of the Mayfilm Corporation which did not refer to new production, would be assigned to Mr. Joe May upon payment of 45,000 Reichsmark. I remember that among these assets the claim against Universal Pictures Corporation for payment of 50,000 Reichsmark contractual penalty was included. At that time, the lawsuit had been lost in the Lower Court. Therefore, one did not estimate the value of this claim very high and as director of the corporation, I had no objections to signing the intermediary balance of August 15, 1930. Therefore, I also agreed to the contents of the partnership agreement between May and Aussenberg.

According to this intermediate balance, Joe May paid to Mayfilm Corporation, 45,000 Reichsmark, and was assigned to him in consideration the assets, including the lawsuit against Universal Pictures Corporation. Only as a matter of form, the lawsuit was continued in the name of the Mayfilm Corporation. In spite of the fact that the lawsuit was continued under the old title, the claim belonged to Joe May, who, from this time on had to bear the costs and give the information regarding the appeal and the later revision to the Supreme Court.

I know these facts for the reason that after

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

August 29, 1930, I had charge of the finances of Mayfilm Corporation and I know that no expenses were paid for the lawsuit after August 29, 1930, until the liquidation of the Mayfilm Corporation.

Joe May continued the lawsuit alone, from August 29, 1930 on.

4. Do you know anything else regarding the questions in this lawsuit which you have not said as yet?

Answer: I had nothing to do with the liquidation of the Mayfilm Corporation.

The foregoing transcribed statements were read to the witness, approved by her and signed as follows:

JOHANNA LOEWENSTEIN

The witness was sworn, the undersigned Notary speaking the following form of oath:

"You swear by God the Almighty and Omniscient, that to the best of your knowledge you have spoken the pure truth and not withheld anything."

Whereupon, the witness, raising her right hand, spoke the words:

"I swear it so, help me God."

(Signed) KARL L. RATZER,

Notary.

MARTA SCHACHT,

Clerk.

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

Number 9: Seen at the German Consulate for the acknowledgment of the above signature of the Notary for the District, Los Angeles, California.

KARL L. RATZER,

Los Angeles, January 3, 1935,

The German Counsul,

Per R.A.H.

Seal of the German Consulate, Los Angeles, California.

[Endorsed]: Filed Sept. 24, 1940.

The correctness of the foregoing photostates with the documents and writings contained in the Court files is hereby acknowledged.

Berlin, June 29, 1939

(Seal of the Superior Court Berlin.)

SCHIRN

Inspector of Justice and as keeper of the records of the office of the Superior Court.

(The entire document has been sewn with thread and closed with the seal of the Superior Court.)

I the undersigned do hereby certify that I am at the date hereof an official in the clerks office of Department 100 of the Superior Court Berlin and am the legal keeper of the official records of the aforesaid Superior Court, that I have compared the foregoing photostatic copy with the original

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

records and documents in that certain action entitled firm of Bank for Foreign Commerce Corporation at Berlin W.8. Markgrafen Street 41

versus

Mayfilm Corporation in liquidation at Berlin, file No. 405.O.113.34, on file in this Court, and now in my possession, and that the same are, and each of them is, true and correct copies of the original of what they purport to be. That the judgment of the Superior Court Berlin dated February 25, 1935 in the above entitled matter has become and now is a final judgment.

I hereby certify to the correctness of this document by my hand and the attached seal of the Superior Court Berlin.

Berlin, November 27, 1939.

(Seal of the Superior Court Berlin.)

SCHIRN

Inspector of Justice as record keeper of Department 100, Clerk's office of the Superior Court.

I, the undersigned, do hereby certify that I am at the date hereof the Chief Judge of the Superior Court Berlin. That at the date hereof, November 29, 1939, Inspector of Justice Schirn is an official in the Clerk's office of the aforesaid Superior Court Berlin and the legal keeper of

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

the official records of the aforesaid Superior Court, that his signature to the foregoing certificate is genuine and that the seal of the Superior Court attached thereto is also genuine, and that he is a proper person to make the foregoing certification and that the attestation is in due form and that the same is in accordance with the laws of the land.

I certify to the correctness of this document by my signature and the affixt, official seal of the Superior Court Berlin.

Berlin, November 29, 1939.

The President of the Superior Court

SCHNITZER

(Seal of the President of the Superior Court at Berlin.)

Gen. 9101 D 3421/2 50.00 R.M. fee for acknowledgment paid.

Berlin, November 29, 1939.

Office of Superior Court Clerk's office.

Signature illegible

Inspector of Justice.

Q. By Mr. Blum: Dr. Gebhardt, I show you a document upon the stationery of the Bank fur Auswartigen Handel, [31] which is the Bank for Foreign Commerce. A. That is correct.

Q. That is written in German? A. It is.

(Testimony of H. A. Gebhardt.)

Q. And is this the English translation of it?

A. I will have to check that for a minute.

Q. Here is your translation. Do you want to compare it with yours?

A. That appears to be a translation.

Q. Yes. And this letter of Ratzer, Bridge & Gebhardt, that refers to your firm?

A. Ratzer, Bridge & Gebhardt was the firm of which I was a member until about a year ago, and I was a member of that firm on February 25, 1936.

Q. That is Mr. Ratzer's signature?

A. That is Mr. Ratzer's signature.

Mr. Blum: Will you stipulate that this letter was received by Universal, Mr. Selvin, together with these enclosures?

Mr. Selvin: Yes.

Mr. Blum: We offer this in evidence as Plaintiffs' exhibit next in order.

Mr. Selvin: Is it offered for any other purpose than to show what notice was given Universal? If it is offered to prove the truth of any of the facts recited in the letter, then we object to it on the ground that it is self-serving. [32]

Mr. Hirschfeld: It is offered for whatever legal effect it may have.

Mr. Selvin: Then we object to it upon the ground that it is self-serving and a recital of past events, and not the best evidence, nor any evidence of the facts which the letter recites have

(Testimony of H. A. Gebhardt.)

occurred. That contains a statement of what is supposed to have happened and what their legal effect was, and matters of that sort.

Mr. Blum: As a further foundation, perhaps I should ask this: Have you ever seen the document in German before? A. I have.

Q. Was that received by your office, your firm?

A. It was.

Q. And from whom was it received?

Mr. Selvin: I will object to that on the ground that that calls for hearsay. [33]

The Court: It is evident that this letter, dated February 12, 1936, from the Bank fuer Auswaertigen Handel, and the translation, the letter of transmittal, can be received only as evidence of the fact that certain notice was given of certain claims, but they cannot be received as proof of title in the Bank by reason of the recital therein. They indicate merely that on that date the Bank claimed to be the owner of the claim by virtue of subrogation. With that limitation the document consisting of the German letter dated February 12, 1936, the translation attached, certified to by Mr. Ratzer, and the letter of transmittal from the firm of Ratzer, Bridge & Gebhardt will be received as one exhibit.

(Testimony of H. A. Gebhardt.)

am the legal owner of said claim and judgment. My title regarding this claim is based upon a contract entered into between myself and Julius Aussenberg, merchant, dated August 29th 1930 pursuant to which together with other properties of Mayfilm A.G. (Corporation) this claim against the Universal Pictures Corporation was assigned to me.

With these premises I hereby transfer and assign to the Bank fuer Auswaertigen Handel Aktiengesellschaft (Corporation) Berlin S.W. Markgrafenstrasse 41 the above mentioned claim and judgment together with interest and all other rights to its fullest extent.

Berlin,

February 9th 1933

(Signed) JOE MAY"

As further security for the above mentioned claim against the Mayfilm Fritz Mandl, General Manager, residing at Hirtenberg in Lower Austria (Austria) is guarantor.

We have held General Manager Fritz Mandl responsible under said guarantee and he has satisfied in full our claims against Mayfilm A.G. (Corporation)

Based upon these facts according to the provisions of the German Laws (§ 774 Civil Code) the guarantor who has satisfied the claims against the principal debtor is subrogated to all the rights of the creditor together with all securities. Therefore the above mentioned General Manager Fritz Mandl

(Testimony of H. A. Gebhardt.)

in Hirtenberg is subrogated to the claim against you in the sum of R.M. 50.000.—together with interest of 2% above Discount of the Reichsbank beginning July 1st, 1926, which has been assigned to us, of which we hereby give you notice. You can only satisfy said debt by payment to the above mentioned (Fritz Mandl)

Very truly Yours

BANK FUER AUSWAERTI-
GEN HANDL

Aktiengesellschaft

(Corporation)

(Signed) DR. LENK SCHLESINGER

I hereby acknowledge the above signatures of:

- 1.) Dr. Erich Lenk, Member of the Board of Directors
- 2.) Kurt Schlesinger, Bank Manager
both of the Bank fuer Auswaertigen Handel
A.G. (Corporation)
Berlin W.8. Markgrafenstrasse 40

Berlin, February 12th 1936

(Signed) WILHELM MANTHEY.

Notary in the District of the Prussian District
Court of Appeal No. 66 Not. Reg. for 1936

[Seal of notary]

Cost bill

value 3000 RM.

Fee according to § 5 Fee Schedule for Notaries
and §§ 32, 41, 51 Prussian Court Cost Law 6.40 RM

(Signed) MANTHEY

Notary

(Testimony of H. A. Gebhardt.)

Karl L. Ratzer, a notary public, in and for the County of Los Angeles, State of California, hereby certifies as follows: That he is familiar with the English and German languages; that he has translated from German into English the hereto attached letter from the Bank for Foreign Trade at Berlin, Germany, dated February 12, 1936 and addressed to the Universal Pictures Corporation, New York, U. S. A., and that the foregoing is a true and correct translation from German into English of said letter.

Dated: February 25, 1936

[Seal] KARL L. RATZER

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card. Universal Pictures. F. Lawler. Date of delivery 2/27/36.

Post Office Department. Official Business. Registered Article.

No. 222127. Insured Parcel.

No.....

Return to Ratzer, Bridge & Gebhardt.

Street and Number, or Post Office Box, 1101
Washington Building.

Los Angeles, California.

[Endorsed]: Filed Sept. 24, 1940.

(Testimony of H. A. Gebhardt.)

Mr. Blum: Is it received as a recital of the fact that the Bank had received payment of its claim?

The Court: No. It can't be received for that.

Mr. Blum: Is it received as the basis of showing that a claim was paid?

The Court: No. You can't receive a notice as basis of a fact. You can receive it only as being a claim that that fact existed. It is not evidence of either the claim or the assignment. It is evidence that somebody claims to have a claim.

Mr. Blum: I understand, your Honor, that that is not conclusive proof——

The Court: It isn't any proof. [34]

Mr. Blum: But what I am trying to find out, is that proof that Fritz Mandl received a claim?

The Court: Certainly not.

Mr. Hirschfeld: What we want, your Honor, is to interpret that as being an admission against interest contained in there of one additional fact; that is, "We acknowledge we have been paid."

The Court: Who? They are not before the court.

Mr. Hirschfeld: I don't understand.

The Court: I mean the Bank is not before the court.

Mr. Hirschfeld: But the Bank, in a letter to the debtor says, "Our claim is paid."

The Court: Yes; and, "You pay to the other man."

(Testimony of H. A. Gebhardt.)

Mr. Hirschfeld: "You pay to the other man."

The Court: That is an admission against interest. [35]

The Court: I will overrule the objection. I think we will discuss the effect after the chain of title is completed.

Q. By Mr. Blum: Dr. Gebhardt, that document refers to paragraph 774 of the Civil Code of Germany?

A. That is right.

Q. Are you familiar with that paragraph?

A. I am.

Q. Of the Civil Code?

A. May I have the Civil Code in German there? There is also the English translation by Mr. Loery, which is also present in court. Paragraph 774 of the German Civil Code—shall I read it in German?

The Court: Unfortunately the reporter can't take it down. You translate it and I will look at it.

A. The section reads—the translation:

"In so far as the guarantor satisfies a creditor the claim of the creditor against the principal debtor [38] is transferred to him."

That is the first sentence of the paragraph upon which you undoubtedly rely. Then it says:

"The transfer cannot be claimed to the detriment of the creditor. Any objections of the main debtor, from a legal relation existing between him and the guarantor, are not affected."

The transfer of a claim is provided for in Section 412 of the German Civil Code. In other words,

(Testimony of H. A. Gebhardt.)

if I may explain this, this is a transfer, by operation of law——

The Court: Yes.

A. ——of a guarantor who pays the main indebtedness.

The Witness: By an operation of law. Section 412 of the Civil Code applies, which says, “The provisions of paragraphs 399 to 404, 406 to 410 of the Civil Code apply to the transfer of a claim by operation of law.” And among this section 1, paragraph 401 of the German Civil Code, which reads as follows: “With the transfer of a claim the mortgages or liens”—you might say pledges—“which exist [39] are also transferred to the new creditor, as well as the rights originating from the guarantee.” That is Section 401. If this translation is not clear I would be very glad to read from Loery’s translation.

Mr. Selvin: We have it translated from Loery’s translation.

The Witness: I didn’t finish Section 401. “The assignee can also claim a right of precedence pertaining thereto in case of a levy of execution or in case of an insolvency.”

Q. By Mr. Blum: If I understand that correctly it means that where a party becomes a guarantor of a certain obligation, and if the guarantor is called upon to pay off that obligation and does in fact pay off that obligation, that by the payment of the particular obligation in question, by opera-

(Testimony of H. A. Gebhardt.)

tion of law he becomes the assignee of the claim, as well as the owner of the security?

A. That is correct. By operation of law he is subrogated or transferred—the claim is transferred to him, as well as any existing mortgages, liens or pledges.

Q. In that document, which is Plaintiffs' Exhibit 5, the German translation thereof, will you read it on page 2 thereof?

A. The letter is signed by two signatures, and underneath the signatures, which are underneath the stamp of the Bank for Foreign Commerce, appear the following: "I hereby [40] acknowledge the above signatures of: First, Dr. Erich Lenk, member of the Board of Directors; second, Kurt Schlesinger, Bankprokuristen,"—which is a technical term, your Honor,—"both of the Bank for Foreign Commerce, a corporation, Berlin W. 8. Markgrafenstrasse 40. Berlin, February 12th, 1936. Signed, Wilhelm Manthey, Notary in the District of the Prussian——"

The Court: Attorney in fact, isn't it?

The Witness: Bankprokuristen is translated here as—the Commercial Code provides for a bankprokuristen, who is really the manager, and the Commercial Code provides that he is really representing the Bank to the outside.

Q. By Mr. Blum: That he is an agent of and authorized to execute documents?

(Testimony of H. A. Gebhardt.)

A. He is. He is the one that signs either letters or documents.

Q. That he is a duly authorized agent; is that what it means?

A. For the purposes of the business, yes.

Mr. Blum: May we have the Lenk deposition, Mr. Clerk?

(Discussion.)

Mr. Blum: In order to go on with Dr. Gebhardt we will have him identify certain documents which will have to be connected up with depositions.

The Court: Go ahead.

Mr. Blum: This is the assignment from Fritz Mandl to [41] the Union Bank, and the translation.

Mr. Selvin: As an assignment, I have no objection to it, but I object to it if it is offered to prove the truth of any of the recitals upon the ground that they are self-serving and not binding upon the defendant. They have the habit, in these things, to tell the whole history whenever they start to show an assignment.

The Court: They are no worse than our "whereases."

Mr. Selvin: I object to the document if it is offered for the truth of any of the recitals. As far as an assignment from Mandl to the Bank is concerned, I am willing to stipulate that if Mandl had anything he assigned it to the Union Bank, but I won't stipulate that he owned anything at the time he assigned it.

(Testimony of H. A. Gebhardt.)

Mr. Hirschfeld: That is all right.

The Court: I cannot single out any recital from the ultimate facts which are set forth. The assignment and the translation will be received as one exhibit.

Q. By Mr. Blum: Dr. Gebhardt, is that translation a correct translation of the German document?

A. I want to look at it. I believe I made it.

Mr. Blum: That will be No. 6, your Honor?

The Court: Exhibit No. 6.

Mr. Blum: The witness has not identified the translation, your Honor.

The Witness: I would like to look at it. I believe I [42] made the translation, but I haven't seen it for some time.

The Court: All right.

The Witness: Yes. That is the translation I made.

The Court: It may be received as Exhibit 6 in evidence.

PLAINTIFFS' EXHIBIT No. 6

ASSIGNMENT

1) The Bank for Foreign Commerce at Berlin, Markgrafenstr. 40 has granted to the Mayfilm Corporation in Liquidation at Berlin a credit of 100.000 Marks in September 1931, for which I, the undersigned Fritz Mandl became guarantor. As security for my guaranty I gave the Bank for Foreign Commerce a deposit in this amount.

(Testimony of H. A. Gebhardt.)

2) Universal Pictures Corporation New York has been ordered to pay the sum of 50.000 Marks with interest of 2% above the discount rate of the Reichsbank from July 1, 1926 by judgment of the District Court of Appeal Berlin July 27, 1932, No. 25 U 5849/30. The appeal from this judgement filed by Universal Pictures has been denied by judgment of the Supreme Court Leipzig of February 3, 1933.

3) In the case No. 405 O 113/34 of the Superior Court Berlin it was held that the claim of the Mayfilm Corporation mentioned under 2 belongs to Joe May, at present in Hollywood, 2020 Grace Avenue and has been legally assigned by him to the Bank for Foreign Commerce as security for the credit granted by it to the Mayfilm Corporation (see No. 1). The judgment 405 O 113/34 has become final, as is shown in the note on the judgment.

4) The Foreign exchange control office Berlin has authorized the Bank for Foreign Commerce in January 1936 to satisfy its claim out of the deposit made by myself as per No. 1. Therefore according to the German Law the claim of the Bank for Foreign Commerce against the Mayfilm Corporation together with all sureties given for this claim, including the claim against Universal has been transferred to me, Fritz Mandl.

With these premises, I, the undersigned Fritz Mandl hereby assign this claim to the Union Bank

(Testimony of H. A. Gebhardt.)

and Trust Company, 8th and Hill Streets, Los Angeles, California.

Vienna April 22, 1936.

[Signed] F. MANDL.

Austrian Revenue stamp.

G.Z. 488/36 U.

I hereby acknowledge the genuineness of the above signature of Mr. Fritz Mandl, Director General in Vienna IV Schwarzenbergplatz 15.

Vienna the 22nd day of April 1936.

[Signed] DR. JULIUS ULLMANN

Notary

[notarial seal]

[Endorsed]: Filed Sept. 24, 1940.

Mr. Blum: This is a power of attorney from Fritz Mandl to Ellis I. Hirschfeld and Dr. Gebhardt to represent him in a suit against Universal Pictures Corporation.

Mr. Selvin: I just took it for granted that if you filed the suit you were authorized to do it.

The Court: All right. It may be received for showing whatever it shows.

(Plaintiffs' Exhibit No. 7.)

(Testimony of H. A. Gebhardt.)

PLAINTIFFS' EXHIBIT No. 7

Power of attorney.

Austrian revenue stamps.

I hereby give power of attorney to the attorneys Ellis I. Hirschfeld, 629 South Hill Street, Los Angeles, California and Dr. Gebhardt of the firm of Ratzer Bridge & Gebhardt, Washington Building Los Angeles, California

to represent me in my suit against Universal Pictures Corporation, Los Angeles and to do all the necessary acts in court and out of court which are necessary to enforce the claim.

Monies collected are to be deposited in the Union Bank & Trust Co Los Angeles in an account in my name.

Mr. Joe May, there, is authorized by me to give information.

Vienna April 22, 1936.

[Signed] F. MANDL

Austrian revenue stamp

G.Z. 487/36 U.

I acknowledge the genuineness of the above signature of Mr. Fritz Mandl, Director General in Vienna IV, Schwarzenberg Place 15.

Vienna, April 22, 1936.

Fee & Tax 10 Shillings.

[Endorsed]: Filed Sept. 24, 1940.

(Testimony of H. A. Gebhardt.)

Mr. Blum: This purports to be an assignment from the Union Bank and Trust Company to John Luhring and Margaret Morris, who are the principal plaintiffs. And I understand, Mr. Selvin, you will stipulate that the signatures thereon are the signatures of officers of the Union Bank and Trust Company of Los Angeles.

Mr. Selvin: Yes, I will stipulate that they are signatures of officers of the Union Bank and that that is the seal of the Union Bank, and that the officers who made that had authority to do so.

Mr. Blum: We will accept that stipulation.

The Court: It may be received as Plaintiffs' Exhibit 8. [43]

PLAINTIFFS' EXHIBIT No. 8

Los Angeles, California

January 16th, 1937

For Value Received, we, the undersigned, hereby sell, transfer and assign to plaintiffs, John Luhring and Margaret Morris, those certain judgments of the German Court, hereinafter described:

(1) Judgment rendered March 4, 1930, in the Superior Court of Berlin, Germany, also known as the Landgericht, in an action entitled, "May Film Corporation, represented by its directors, Joe May and Manfred Liebenau" vs. defendant, represented by its attorneys, Counsellor of Justice, Dr. Rosenberger, Dr. Richard Frankfurter, and Dr. Gerhard

(Testimony of H. A. Gebhardt.)

Frankfurter, which said action is numbered with the number of the case given under the German laws, as follows: 74.0.590.26/70.

(2) Judgment rendered July 27, 1932, in the District Court of Appeal in Berlin, Germany, also known as Kammergericht, being No. 25.7.5849/30 74.0.590/26 and that in said action the May Film corporation was in liquidation and was represented by its liquidator, Attorney Dr. Alexander Meier, whose attorney was Dr. Paul Dienstag. That the defendant was represented by its board of directors, President Carl Laemmle, Vice President, Robert H. Cochrane, Secretary Helen E. Hughes, treasurer E. H. Goldstein, and said defendant's counsel was attorney Dr. Saare.

(3) Judgment rendered February 3, 1933, in the Supreme Court of Germany, also known as the Reichsgericht, in which the May Film Corporation was represented by its liquidator, whose attorney was Dr. Fuchlocher, and the defendant was represented by its board of directors, whose attorney was Attorney Counsellor of Justice Dr. Schrombogens.

[Seal]

UNION BANK AND TRUST
CO. OF LOS ANGELES

By [Illegible]

By DR. R. CAMERON

[Endorsed]: Filed Sept. 24, 1940.

(Testimony of H. A. Gebhardt.)

The Court: It is stipulated that the depositions about to be offered were taken pursuant to stipulation. Do you want to withdraw Dr. Gebhardt while you read that?

Mr. Blum: Yes. This is a deposition which was taken in the case of——

Mr. Selvin: Just a moment. Before you read it I think we should, perhaps, add to our stipulation, with respect to the stipulation of the depositions, that the stipulation provides that all objections, except as to the form of the question, should be reserved to the time of trial.

Mr. Blum: I still think we should introduce a copy of the stipulation. [44]

The Court: That is the usual stipulation.

Mr. Blum: I am about to read from the deposition of Fritz Mandl taken in the action of John Luhring and Margaret Morris, as joint tenants, plaintiffs, against Universal Pictures Corporation, a corporation; Universal Pictures Company, Inc., a corporation, defendants, No. 7962 - Y, which is the action pending in this particular court. The deposition starts out:

“Luhring v. Universal [45]

“It Is Further Stipulated and Agreed that the notice to be given for the above mentioned hearing is hereby waived.”

Mr. Taub was acting as attorney for plaintiff.

(Deposition of Fritz Mandl.)

“Q. (By Mr. Taub): What is your full name? A. Fritz Mandl.

“Q. What is your legal residence?

“A. Monte Carlo.

“Q. Where do you reside in the City of New York at the present time?

“A. Ritz Carlton Hotel.

“Q. Did you ever have a transaction with the Foreign Bank for Commerce at Berlin in which you became a guarantor of an obligation of Mr. Joe May?

“Q. Do you know a Mr. Joe May?

“A. Yes.

“Q. Do you know the Foreign Bank for Commerce at Berlin, Germany?

“A. Yes.

“Q. Did you ever guarantee any obligation of Mr. Joe May to the said Bank for Commerce of Berlin?

“Q. Did you ever have a discussion with Mr. Joe May about guaranteeing something for him with the Bank for [46] Foreign Commerce in Berlin? A. Yes.

“Q. Did you then make arrangements with the Bank for Foreign Commerce to arrange for such a guarantee on behalf of Joe May?

“A. Yes.

“Q. Have you any documents here which pertain to your negotiations with the bank for such guarantee?

(Deposition of Fritz Mandl.)

Mr. Selvin: No. The witness answered
"No." [47]

"Q. Where would such documents or letters
be?

"Q. Were any documents or letters ex-
changed between you and the bank pertaining
to your taking over this guarantee?

"A. Yes.

"Q. Where are such documents or letters
at the present time?

"A. They may be in Vienna, I don't know.

"Mr. Katz: I move to strike out everything
other than 'I don't know.'

"Q. Do you think those documents are in
Vienna at the present time? [48]

"A. Yes."

The Court: Unless Mr. Selvin indicates that he
renews the objection I assume that he doesn't.

Mr. Blum: (Reading)

"Q. In what year did your negotiations with
the said bank take place?

"A. 1928 or 1929, I don't know exactly.

"Q. Do you recall whether you were ever
called upon to pay to the Bank for Foreign
Commerce under the terms of your guarantee?"

Mr. Selvin: Just a moment. We object to that
upon the ground that it assumes facts not in evi-
dence; no foundation to show that there ever was
a guarantee, or if there was, what its terms were.

(Deposition of Fritz Mandl.)

It further calls for the conclusion of the witness as to whether any payments he might have made were under the terms of the guarantee or under the terms of something else.

(Discussion.)

The Court: I will overrule the objection at the present time. At the conclusion of plaintiffs' evidence you may move to strike, if no proof of a guarantee should appear. Objection overruled.

Mr. Blum: (Reading) [49]

"A. Yes.

"Q. Do you know about when this took place?

"A. Between 1932 and 1934, about.

"Q. Did you make payment to the bank?"

Mr. Selvin: It will be understood that my objection runs to this entire line of testimony, then, relating to payment?

The Court: Yes. And the objection is overruled.

Mr. Blum: (Reading)

"A. Immediately.

"Q. Do you recall in what form payment was made by you to the bank on the said guarantee? A. Yes.

"Q. In what form was payment made?

"A. To the debit of my French franc account with the Bank for Foreign Commerce at Berlin.

(Deposition of Fritz Mandl.)

“Q. As a result of this payment which the bank obtained from you under your guarantee, do you recall that the bank gave you an assignment of a certain claim which they held against Universal Pictures Corporation, New York City, U. S. A.?”

Mr. Selvin: We object to that question on the ground [50] that it assumes facts not in evidence, namely, that there was a guarantee, or that there was an assignment; upon the ground that it calls for a conclusion of the witness as to the effect of certain transactions.

The Court: Objection overruled.

Mr. Blum: (Reading)

“A. Yes.

“Q. Do you recall about when this was?

“A. Between 1932 and 1934.

“Q. Have you got this document showing the assignment by the bank to you of their claim against Universal Pictures Corporation here? A. No.

“Q. Do you know where this document is at the present time? A. No.

“Q. Did you instruct the Bank for Foreign Commerce to notify Universal Pictures Corporation, New York, of the assignment? [51]

“A. No.

“Q. Do you know whether the Bank for Foreign Commerce notified Universal Pictures

(Deposition of Fritz Mandl.)

Corporation at New York City of the assignment of their claim to you? A. Yes.

“Q. Did you ever see the signature of Dr. Eric Lenk who was connected with the Bank for Foreign Commerce at any time?

“A. Yes.

“Mr. Taub: I ask that this paper be marked Plaintiffs’ Exhibit 1 for identification.”

Mr. Hirschfeld: Here it is.

Mr. Blum: That is only a photograph.

Mr. Hirschfeld: You have got the original in evidence.

Mr. Selvin: It is in as Plaintiffs’ Exhibit 5.

Mr. Hirschfeld: Plaintiffs’ Exhibit 1 for identification.

Mr. Selvin: It is marked as Exhibit 1 for identification in the deposition, but it is in evidence as part of Plaintiffs’ Exhibit 5.

Mr. Hirschfeld: Yes.

The Court: All right. You don’t have to introduce it [52] again. Just identify it.

Mr. Blum: This is the document which has been marked Plaintiffs’ Exhibit 1 for identification, April 15, 1940, initialled by the Notary, which is a duplicate original of Plaintiffs’ Exhibit 5.

The Court: All right.

Mr. Selvin: That is part of Plaintiffs’ Exhibit 5, you mean?

Mr. Blum: Pardon?

(Deposition of Fritz Mandl.)

Mr. Selvin: It is a duplicate of a part of Plaintiffs' Exhibit 5, being that part which consists of the letter, dated February 12, 1936, from the Bank for Foreign Commerce.

Mr. Blum: That is correct.

The Court: All right. Proceed.

Mr. Blum: (Reading)

"Q. I show you Plaintiffs' Exhibit 1 for identification and ask you whether you recognize the signature of Dr. Eric Lenk on the said document? A. Yes.

"Q. And you know this signature to be the signature of Dr. Eric Lenk?

"Q. Do you know what position Dr. Eric Lenk held at the Bank for Foreign Commerce at the time this document was executed in February 1936? [53] A. Yes.

"Q. What was his position at the time?

"A. A member of the Board.

"Q. Do you know whether he was authorized to execute important documents on behalf of the said Bank for Foreign Commerce?"

Mr. Selvin: I object to that upon the ground that it calls for a conclusion of the witness and is hearsay.

The Court: You couldn't prove agency that way, with someone that wasn't connected——

Mr. Blum: That was the question.

(Deposition of Fritz Mandl.)

The Court: I will sustain the objection to the question.

Mr. Blum: The next answer, then, will not be given.

The Court: No. The objection is sustained.

Mr. Blum: (Reading)

“Q. Did you have transactions of another nature with the same Bank for Foreign Commerce?”

The Court: I will sustain it, in view of the court sustaining the objection to the previous question. [54]

“Q. And you were present when Dr. Lenk did sign other important documents as an authorized officer of the said bank?”

Mr. Selvin: I object to that upon the same grounds previously urged, upon the further ground that it calls for the conclusion of the witness.

The Court: Objection sustained.

Mr. Blum: (Reading)

“Q. Did you ever see this document before?”

The witness's attention was undoubtedly directed to Plaintiffs' Exhibit 1 for identification, which is Plaintiffs' Exhibit 5. At least, that is my conclusion.

“A. I can't remember.

“Q. You do remember, however, that the Bank for Foreign Commerce notified Universal

(Deposition of Fritz Mandl.)

Pictures Corporation of New York of the fact that they had assigned to you the claim which they held against Universal Pictures Corporation?"

Mr. Selvin: We object to that upon the ground that it is self-serving, leading, calling for a conclusion of the witness and it is hearsay.

The Court: In view of the stipulation made in conjunction with the notice, I don't think this is material. Mr. Selvin is willing to admit, in regard to the third document in Exhibit 5, that it was actually sent and received, for whatever it may be worth. In view of that I will sustain the objection. [56]

Mr. Blum: (Reading)

"Q. I show you a document, Plaintiff's Exhibit 2 for identification, and ask you whether it is your signature?"

Mr. Selvin: That is already in evidence as Plaintiffs' Exhibit 6, isn't it? It is the assignment from Mandl to the Union Bank.

Mr. Hirschfeld: Yes.

The Court: All right.

Mr. Blum: (Reading)

"A. Yes.

"Q. Do you recall when you executed this document? A. Yes, 1936.

"Q. I show you the document marked

(Deposition of Fritz Mandl.)

Plaintiffs' Exhibit 2 for identification and ask you when you affixed your signature?

"A. On April 22, 1936.

"Q. And what does this document represent?

"Q. Is this document an assignment by you of certain claims against Universal Pictures Corporation to the Union Bank and Trust Company of Los Angeles?"

Mr. Selvin: The document will speak for itself.

The Court: Do you insist on the objection? [57]

Mr. Selvin: I do. I think the document speaks for itself.

The Court: Well, he may identify it. Objection overruled.

Mr. Blum: (Reading)

"A. Yes.

"Mr. Taub: I offer it in evidence."

That is the document which has been received as Plaintiffs' Exhibit 6.

"Q. This assignment which you made to the Union Bank & Trust Company originated as an assignment to you from the Bank for Foreign Commerce in Berlin, is that correct?"

Mr. Selvin: I object to it on the ground that it is leading, that it calls for a legal conclusion of the witness upon one of the important issues in the case.

The Court: Objection overruled.

(Deposition of Fritz Mandl.)

Mr. Blum: (Reading)

“A. Yes, the same thing.

“Q. And the assignment which was made to you by the Bank for Foreign Commerce at Berlin, of a claim against [58] Universal Pictures Corporation, was made after you had paid your guarantee to the Bank for Foreign Commerce in French francs?”

Mr. Selvin: I object to that on the ground that it assumes facts not in evidence, namely, that there was an assignment from the Bank for Foreign Commerce to the witness, and secondly, that there was a guarantee, and further, it calls for a conclusion of the witness.

The Court: Objection overruled.

Mr. Blum: (Reading)

“A. Yes.

“Q. I show you Plaintiffs' Exhibit 3 for identification and ask you whether that is your signature? A. Yes.”

What is Plaintiffs' Exhibit 3?

Mr. Selvin: Plaintiffs' Exhibit 7, the power of attorney.

Mr. Blum: (Reading)

“Q. Do you recall when you signed this document? A. 1936.

“Q. Does this represent a power of attorney which you gave to Mr. Ellis S. Hirschfeld at Los Angeles and to Dr. Gebhardt of the firm

(Deposition of Fritz Mandl.)

of Rotz, Bridges & Gebhardt, also attorneys at Los Angeles, to represent you in your action against Universal Pictures Corporation, Los Angeles? [59]

That has already been received.

“Q. When you made payment to the Bank for Foreign Commerce in Berlin on your guarantee in the Joseph May matter, do you know whether the said bank obtained the permission of the Foreign Exchange Control Office at Berlin?

Mr. Selvin: We object to that upon the ground that it is not the best evidence and no way to prove an official document or transaction in Germany. This is a matter of some importance, because, I think, the law agrees that such a permit would be necessary to the validity of the transaction. I think we are entitled to have a copy, or if there is a permit—

The Court: Objection sustained.

Mr. Blum: (Reading)

“Q. When the bank delivered to you the assignment of their claim against Universal Pictures Corporation, do you know whether they obtained the permission of the Foreign Exchange Control Office at Berlin?”

Mr. Selvin: I make the same objection as to the last question and answer.

The Court: Objection sustained.

(Deposition of Fritz Mandl.)

Mr. Blum: Then followed the cross examination by Mr. Katz.

“Q. (By Mr. Katz) Mr. Mandl, in 1928 or 1929 were you a citizen of Austria? [60]

“A. Yes.

“Q. Where were you in 1928?

“A. Vienna.

“Q. During the whole time?

“A. No.

“Q. Do you recall whether——”

“Q. Do you recall whether during the year 1928 you went to Berlin, Germany?

“A. Every month.

“Q. And is that likewise true with respect to the year 1929?

“A. Yes, until 1933.

“Q. Are you a citizen of Austria?

“A. Yes.

“Q. Did you ever have an account with the Bank for [61] Foreign Commerce in Berlin?

“A. Yes.

“Q. When did you open that account?

“A. At the time of the formation of the bank as a matter of course, 1924 or 1925.

“Q. And at the time of the opening of that account did you have a French franc account?

“A. I don't know.

“Q. Do you recall when you first opened a French franc account with the Bank for Foreign Commerce in Berlin?

(Deposition of Fritz Mandl.)

“A. No.

“Q. Did you have anything to do with the organization of the May Film Corporation?

“A. No.

“Q. Were you at any time an officer of the May Film Corporation?

“A. That may be, I don't know.

“Q. Were you at any time a stockholder of the May Film [62] Corporation?

“A. No.

“Q. Were you at any time a director of the May Film Corporation?

“A. I don't know.

“Q. Were you at any time an officer of the Bank for Foreign Commerce?

“A. No.

“Q. Were you at any time a director of the Bank for Foreign Commerce? A. No.

“Q. Were you at any time a stockholder of the Bank for Foreign Commerce?

“A. No.

“Q. Do you recall that at one time the May Film Corporation arranged for a credit from the Bank for Foreign Commerce? [63]

“A. Yes.

“Q. Do you recall what the amount of that credit was?

“A. I believe 100,000 marks.

“Q. Do you recall when that occurred?

(Deposition of Fritz Mandl.)

“A. I don’t know. between 1928 and 1930, probably. I can’t recall the years.

“Q. Do you recall that the May Film Corporation was in liquidation at the time that it arranged for a credit from the Bank for Foreign Commerce in the sum of approximately 100,000 marks?

“A. I don’t know, no.

“Q. I show you Plaintiffs’ Exhibit 2 for identification and ask you whether that refreshes your recollection that at the time that the May Film Corporation arranged for a credit of 100,000 marks with the Bank for Foreign Commerce that the May Film Corporation was in liquidation?

“A. No.

“Q. I again show you Plaintiffs’ Exhibit 2 for identification and ask you whether that refreshes your recollection as to the date when the May Film Corporation arranged for a credit of 100,000 reichmarks with the Bank for Foreign Commerce?

“A. No.

“Q. I again show you Plaintiffs’ Exhibit 2 for identification and ask you whether that refreshes your recollection as to the date when you first opened a French franc account [64] with the Bank for Foreign Commerce.

“A. No.

“Q. Do you recall whether at the time that

(Deposition of Fritz Mandl.)

the May Film Corporation arranged for a credit of 100,000 marks with the Bank for Foreign Commerce that you executed any papers or writings?

“A. Yes.

“Q. Do you have the papers or documents or writings which you executed at that time?

“A. No.

“Q. Do you recall where you executed those papers or documents or writings?”

There was an objection and the question was rephrased.

“Q. Do you recall in what city you executed or signed those papers or documents or writings?

“A. In Vienna or Berlin.

“Q. Is Mr. Joe May related to you?

“A. Very distant.

“Q. Do you know whether in 1928 to 1931 Mr. Joe May was a citizen of Germany?

“A. I don't know.

“Q. Do you recall whether Mr. Joe May left Germany after 1928 or 1929?

“A. Yes.

“Q. Do you know when Mr. Joe May left Germany?

“A. No. [65]

“Q. Mr. Mandl, did the Bank for Foreign Commerce ever deliver to you any stocks or bonds or other securities which had been

(Deposition of Fritz Mandl.)

pledged with it in connection with any loans to the May Film Corporation?

"A. No.

"Q. Mr. Mandl, do you have here any statements rendered to you by the Bank for Foreign Commerce for the period from 1929 through 1937?

"A. No.

"Q. Mr. Mandl, at the time that the May Film Corporation arranged for the credit of 100,000 marks with the Bank for Foreign Commerce, did you at that time have on deposit with the Bank for Foreign Commerce, and to your credit, any marks?

"A. No.

"Q. Mr. Mandl, in 1936, did you have on deposit with the Bank for Foreign Commerce any marks?

"A. No.

"Q. Did you know that in 1936 the May Film Corporation was in liquidation?

"A. No.

"Q. Did you ever know that the May Film Corporation was or had been in liquidation?

"A. Yes.

"Q. When did you first ascertain that the May Film Corporation was in liquidation? [66]

"A. I don't know.

"Q. What is your best recollection as to

(Deposition of Fritz Mandl.)

when you first ascertained that the May Film Corporation was in liquidation?

“A. I know that when Mr. Joe May left, the May Film Corporation was in liquidation.

“Q. When you say at the time that Joe May left, you mean at the time Joe May left Germany?

“A. Yes.

“Q. Do you know who the liquidator was of the May Film Corporation at the time that Joe May left Germany?

“A. No.

“Q. Did you ever hear of a man by the name of Hausdorf?

“A. No.

“Mr. Katz: That’s all.”

The Court: The deposition will be received in evidence and marked as Plaintiffs’ Exhibit No. 9, and it will be transcribed in any record made of these proceedings.

Mr. Blum: This is the deposition of Erich Lenk, taken on stipulation, which stipulation was forwarded to the Notary, which has not been attached to the deposition. May [67] we have the same stipulation with regard to the Lenk deposition as we had with regard to the Mandl deposition?

Mr. Selvin: The same stipulation?

Mr. Blum: Yes.

Mr. Selvin: Yes. [68]

“Witness:

DR. ERICH LENK

“Direct Examination

“By Mr. Taub

“Q. What is your full name?

“A. Erich Lenk.

“Q. Where do you reside?

“A. 1781 Riverside Drive, New York City.

“Q. When did you arrive in the United States?

“A. In November, 1937.

“Q. Do you know a Mr. Joe May?

“A. I know him personally.

“Q. And where did you meet him?

“A. I met him in Berlin, Germany.

“Q. Do you know a Mr. Julius Aussenberg?

“A. I know him personally.

“Q. And where did you meet him?

“A. In Berlin.

“Q. Do you know a Mr. Fritz Mandel? [69]

“A. I do know Mr. Fritz Mandel.”

Mr. Selvin: May I ask counsel for a stipulation at this point? In the deposition the word “Mandl” is misspelled all the way through as M-a-n-d-e-l. It should be M-a-n-d-l.

The Court: All right.

Mr. Selvin: Will counsel stipulate that that is the same person?

The Court: The signature will show the correct spelling.

(Deposition of Dr. Erich Lenk.)

Mr. Hirschfeld: Yes. I will stipulate that that is the same Fritz Mandl that has been mentioned.

Mr. Selvin: The same Fritz Mandl that has been mentioned, and will continue to be mentioned in this lawsuit.

“Q. And where did you meet him?

“A. In Berlin for the first time.

“Q. Were you ever connected with the Bank for Auswartigen Handel?

“A. Yes.

“Q. Were you ever an officer of the said bank?

“A. I was.

“Q. In your capacity, as an officer of said bank, did you ever arrange for loans with customers?

“A. I did.

“Q. Was the May Film, A. G. a customer of you bank?

“A. Yes.

“Q. Do you recall whether you negotiated with Mr. Joe [70] May, who represented the May Film, A. G.?

“A. I did.

“Q. Did you ever negotiate regarding a loan with May Film, A. G.?

“A. I did.

“Q. Do you recall approximately in what year that was?

(Deposition of Dr. Erich Lenk.)

“A. Between 1928 and 1930.

“Q. Do you recall the amount of the loan, approximately?

“A. Approximately 80,000 Reichsmarks.

“Q. Were you present during the negotiations for the loan?

“A. I was.

“Q. Do you recall what arrangements were made to obtain collateral for the said loan in favor of your bank?

“A. I do.

“Q. And will you tell us, please, what arrangements were made in regard to this particular loan for collateral in favor of your bank?”

Mr. Selvin: I object to that on the ground that it is not the best evidence, and calls for a conclusion of the witness.

The Court: Well, we do not know whether negotiations were later reduced to writing. Until we do, it may be material.

Mr. Blum: (Reading)

“A. Different collaterals for the loan, personal [71] guaranty of Mr. Joe May, personal guaranty of his wife, a valuable stamp collection in the possession of Mr. May, and the personal unlimited guaranty of Mr. Fritz Mandel. And furthermore, the assignment of a claim of

(Deposition of Dr. Erich Lenk.)

the May Film A. G. against Universal Pictures Corporation of New York.

“Q. Do you recall the approximate amount of this claim of the May Film A. G. against Universal?

“A. The principal was 50,000 marks, and there was a very large amount of interest.

“Q. Do you know whether May Film A. G. or Mr. Joe May paid the loan to your bank when it was due?

“A. Yes.

“Q. Will you tell us whether payment was made to the bank?

“A. Yes, the loan was not paid.

“Q. Did you on behalf of your bank make a claim for the payment of this loan to the guarantor, Mr. Fritz Mandel?

“A. I did.

“Q. And did Mr. Fritz Mandel pay the said loan to your bank under the terms of his guaranty?

“A. Yes.

“Q. Do you recall how payment was made to your bank?

“A. I do recall.

“Q. In what form?

“A. Mr. Fritz Mandel had a sizeable balance to his credit with our bank and we charged his account with the sum [72] for which he was the guarantor.

(Deposition of Dr. Erich Lenk.)

“Q. After Mr. Fritz Mandel paid under the terms of his guaranty, did your bank notify Universal Pictures Corporation of New York City that the judgment which the May Film A. G. obtained against Universal Pictures Corporation had been assigned and now belongs to Mr. Fritz Mandel?

“A. No.

“Q. What was your position with the bank for Auswartigen Handel on or about February 25, 1936?

“A. I was Vorstandes Mitglied.”

Dr. Gebhardt: What is that?

Mr. Hirschfeld: Member of the board of directors.

Dr. Gebhardt: Member of the board of directors.

Mr. Blum: (Reading)

“Q. I show you Plaintiffs' Exhibit 1 marked for identification on April 15, 1940, at the hearing of Mr. Fritz Mandel, another witness in this case, and ask you whether this exhibit contains your signature?

“A. It does.

“Q. I show you Plaintiffs' Exhibit 1 marked for identification and offered in evidence, subject to objection, and ask you whether this is a duplicate original of an original letter sent to Universal Pictures Corporation, New

(Deposition of Dr. Erich Lenk.)

York, on February 25, 1936, by your bank under your signature?

“A. Yes.”

Mr. Hirschfeld, for the purpose of the record will you [73] identify that?

The Court: It is the letter, in German, attached to Exhibit 5, dated February 12, 1936.

Mr. Blum: (Reading)

“Q. Did you, on behalf of your bank, obtain a promise from the Foreign Exchange Control Office in Berlin for the transfer and assignment of the judgment obtained by May Film A. G. against Universal Pictures?”

Mr. Selvin: We object to that on the ground that it calls for a conclusion of the witness; on the further ground that it is not the best evidence of the granting of any such permit.

The Court: Objection overruled.

Mr. Blum: (Reading)

“A. I did.

“Q. Are you still connected with this bank which is mentioned in the testimony herein?

“A. No.

“Q. When did you terminate your connection with the said bank?

“A. On May 31, 1937. [74]

“Q. Are you in the possession of any of the documents at this time pertaining to the transaction mentioned in your testimony today?

(Deposition of Dr. Erich Lenk.)

“A. No.

“Q. In your opinion, where are the documents which I just referred to?

“A. In the archives of the Bank for Auswartigen Handel.

“Q. I presume you mean in the City of Berlin, Germany?

“A. Yes.”

“Cross Examination

“By Mr. Katz

“Q. Doctor, you were asked a question about whether you, on behalf of your bank, got a certain type of authorization from some agency in Germany with respect to the transfer of a judgment. Do you recall being asked that question?

“A. I do.

“Q. Whatever it was that was received, was in writing, was it not?

“A. It was.

“Q. And in answering the question that was put to you, you gave your interpretation of the writing, is that right?

“A. Yes. [75]

“Q. Did you ever see the writing which formed the basis of the opinion which you expressed in answer to the question that you did obtain that type of permission?

“A. Yes.

(Deposition of Dr. Erich Lenk.)

“Q. When did you last see it?

“A. The latest, beginning 1937.

“Q. So that in testifying here today, you are recalling the contents of that paper which you saw in 1937, is that right?

“A. Yes.

“Q. And then, based upon your recollection of what was in that paper, you told us that it was a permission?

“A. Yes.”

Based on that testimony in the cross examination I now move to strike the answer to the question at the bottom of page 8 and the answer at the top of page 9 of the deposition, relating to an alleged promise from the Foreign Exchange Control Office to the transfer and assignment of the judgment, on the ground that the question calls for, and the answer gave evidence that was not the best evidence of the facts in that regard, it appearing that the promise or permit or whatever it was, was in the form of an official written document.

Mr. Blum: The deposition also states that those documents, the last he ever saw them, were somewhere in Berlin.

Mr. Selvin: There is no proof that they are unavailable. [76]

The Court: No.

Mr. Selvin: There is no testimony that the bank is out of business, and there is no testimony that

(Deposition of Dr. Erich Lenk.)

the Berlin Foreign Exchange Control Office is out of business. On the contrary, I understand it is very much in business at the present time. That is an official government body. I am not urging the objection to be captious, but it is likely to be of some moment in this case and I think the plaintiff should produce the document so its interpretation will be authenticated, rather than the guess of a layman.

Mr. Hirschfeld: Your Honor, we will show a little later in the case that the Devisen stelle handles, through some 18,000 employees thousands upon thousands of such transactions, and that the permit which is issued is a printed form, very short and very familiar to all banks and banking people, and that the mere seeing of the form, we contend, would be sufficient for the witness to say that he did get the permit; in the same manner that if any of us were unfortunate enough to receive traffic tickets by the thousands, as Mr. Lenk had probably received these permits, we wouldn't have to handle it to see if it was a traffic citation.

Mr. Selvin: I have what purports to be an English translation of this particular permit. It does not authorize a transfer of this judgment to an Austrian national, in my judgment.

Mr. Hirschfeld: Since counsel has the translation, [77] perhaps that is the best proof of the transaction. We understand the bank is out of business and has been out of business for quite

(Deposition of Dr. Erich Lenk.)

some time. Secondly, we ask the court to rely upon the general presumption that a bank in Germany, especially in these troubled times, would certainly obey the instructions of the law and comply with the law. We must presume that they will do so. Secondly, since counsel is objecting that we are assuming a fact not in evidence, must not counsel show that such a permit was necessary? It isn't our duty to show that any such permit——

The Court: The point is this: We assume that the permit was necessary. Merely because it involves a transfer of foreign exchange, then I think it would be a collateral matter; but it was necessary, because it involved the transfer of a judgment to the national of another country. Then, of course, it becomes important in determining whether or not the chain of title is complete.

Mr. Hirschfeld: Isn't that a matter of defense?

Mr. Selvin: But the point I make is that you are offering testimony as to a permit. [78]

The Court: I will sustain the objection at the present time. If, in the light of the defense, you decide to offer it later on, then the offer may be renewed.

Mr. Selvin: Continuing the cross examination:

“Q. Now, you testified that May Film A. G. was a customer of the Bank for Auswartigen Handel, is that right?

“A. Yes.

(Deposition of Dr. Erich Lenk.)

"Q. You also testified that the bank had extended a loan or a credit to May Film A. G., is that right?

"A. Yes.

"Q. Was the loan the subject of a written paper or document?

"A. It was.

"Q. Did you ever see that written paper or document?

"A. I did.

"Q. When did you last see it?

"A. Approximately 1928.

"Q. You testified that certain things were put up as collateral in connection with the loan, is that right?

"A. I did.

"Q. Now, was the collateral that was put up by Joe May something that existed in the form of a writing?

"A. Yes.

"Q. And when you said that as collateral Joe May made [79] a certain type of guaranty, you were referring to the writing, is that right?

"A. Yes.

"Q. In other words, when you called that paper a guaranty, you were giving us your understanding of what was in the paper?

"A. Yes or no, I cannot answer.

"Q. Do you recall Mr. Taub asked you whether Joe May personally guaranteed the

(Deposition of Dr. Erich Lenk.)

May Film A. G. loan and you answered 'yes'.
Do you recall that?

"A. I don't recall.

"Q. Do you recall stating that as part of the collateral of the May Film A. G. loan, the bank had a guaranty from Joe May?

"A. Yes.

"Q. That paper was in writing?

"A. Yes.

"Q. Do you recall what that paper said, in so many words, correctly and accurately?

"A. No, not in detail.

"Q. Do you also recall that you said Fritz Mandel gave a guaranty?

"A. I did say it.

"Q. Were you referring to a paper in writing?

"A. Yes.

"Q. Do you recall exactly what that said?
[80]

"A. No.

"Q. Do you recall that you testified that a judgment was put up as collateral?

"A. I do.

"Q. Was that pursuant to a paper in writing?

"A. Yes.

"Q. And do you recall the exact language of that paper?

(Deposition of Dr. Erich Lenk.)

“A. I don’t recall.

“Q. With respect to that judgment, weren’t there two pieces of paper executed?

“A. I don’t get that.

“Q. Wasn’t there more than one writing executed with respect to that judgment?

“Q. Do you understand my question?

“A. No. In which sense do you mean executed?

“Q. Signed. Wasn’t there a piece of paper executed which said what that judgment was to be collateral for?

“A. There was.

“Q. It would make a difference, would it not, whether that piece of paper said that the judgment was to be collateral for a guaranty, or whether the judgment was to be a collateral for the loan?

A. It would.” [81]

Mr. Selvin:

“Q. You testified that there came a time when a certain debit was made, or a certain charge was made in Fritz Mandel’s account. Do you recall that?

“A. I do.

“Q. Was that pursuant to an express authorization in writing from anybody?

“A. No.”

Mr. Selvin:

“A. No.

(Deposition of Dr. Erich Lenk.)

“Q. In other words, the bank had certain deposits which belonged to Fritz Mandel and the bank claimed that Fritz Mandel owed it some money under a writing, and so the bank proceeded to charge Fritz Mandel’s account, is that right?

“A. Exactly.

“Q. Will you look at plaintiff’s Exhibit 1 for [82] identification, which consists of three pages, and tell me on which page your signature appears?

“A. On page 2.

“Q. And is it the first signature which appears on page 2?

“A. Yes.

“Q. Whose signature is the second signature on page 2?

“A. The second signature is the signature of Kurt Schlesinger.

“Q. And whose signature is the third signature on page 2?

“A. The third signature is the signature of a Notary Public, a German Notary Public.

“Q. The bank for Auswartigen Handel was an aktiengesellschaft, was it not?

“A. Yes.”

Mr. Hirschfeld: We will stipulate that the word “stock company” may be inserted in place of “aktiengesellschaft”.

(Deposition of Dr. Erich Lenk.)

The Court: All right.

Mr. Selvin: A stock company or corporation.

“Q. And as an aktiengesellschaft it had a charter and it had by-laws?

“A. Yes.

“Q. And the Bank for Auswartigen Handel also had a Board of Directors, did it not? [83]

“A. It did.

“Q. Prior to the time that you signed Plaintiff's Exhibit 1 for identification, was there any resolution passed by the Board of Directors with respect to plaintiff's Exhibit 1 for identification?

“A. No.

“Q. Was Fritz Mandel at any time an officer, director or stockholder of the bank?

“A. He was not an officer and not a director. If he was a stockholder, I don't know.

“Q. Did you know Mr. Fritz Mandel well?

“A. Well yes, I knew him.

“Q. You knew him in a business sense?

“A. Yes.

“Q. And you came in frequent contact with him?

“A. I did.”

That is the end of the cross examination, and in view of that cross examination I have a certain motion to strike, as soon as I locate the particular portion.

(Deposition of Dr. Erich Lenk.)

“Redirect Examination

“By Mr. Taub. [84]

“Q. When you, Dr. Lenk, acting on behalf of your bank were negotiating for the loan which we are talking about here, did you also negotiate for the guaranties with Mr. Joe May and Mr. Fritz Mandel?

“A. Yes.

“Q. And the written papers which were executed and about which you testified on the cross examination a few minutes ago were the result and contained guaranties that you negotiated with Mr. Joe May and Mr. Fritz Mandel?

“A. Yes.

“Q. In your capacity as an officer of the bank, did you require authority from the Board of Directors to write letters?

“A. No.

“Q. And when you wrote the letter which is marked plaintiff's Exhibit 1 for identification, you did not ask for authority, and you did not obtain such authority from the Board of Directors?

“A. I did not.

“Q. Do you know whether the Board of Directors did act on the contents of your letter before you wrote it?

“A. I know that it did not act.”

That is the conclusion of the deposition. It is signed and notarized in proper form, I am willing to stipulate. I move to strike the testimony of

(Deposition of Dr. Erich Lenk.)

the deposition just read, beginning on page 4 with the question: "Do you recall the [85] amount of the loan, approximately?" and the answer, "Approximately 80,000 Reichsmarks." Then the answer to the question on page 5, the question being, "And will you tell us, please, what arrangements were made in regard to this particular loan for collateral in favor of your bank?", upon the ground that the questions call for and the answers contain what is not the best evidence of the transactions; it having been testified by the witness that the transactions were reduced to writing, and there being no proof of the destruction or the non-availability of the writings at this time or at the time the deposition was taken. [86]

The Court: I will overrule the objection. I think it is a strong, arguable point on the sufficiency of notice. I will deny the motion to strike and overrule the objections to the particular questions. The deposition, with the deletion of the questions to which objection was sustained, will be received in evidence and marked as Plaintiffs' Exhibit 10. [92]

The Court: I think, gentlemen, there is one thing we overlooked. I think this translation should be received, along with the other, in view of the fact that there is a difference in the wording. This may be received as plaintiffs' next exhibit.

The Clerk: Plaintiffs' Exhibit 11. [93]

(Deposition of Dr. Erich Lenk.)

PLAINTIFFS' EXHIBIT No. 11

Bank of foreign Commerce
Stock Corporation.

Berlin, February 25, 1936.
Markgrafent. 40.

Universal Pictures Corporation
New York/U.S.A.

Herewith we wish to advise you as follows:

The following assignment was given to our bank as security for our claims against Mayfilm Corporation in Liquidation under date of February 9, 1933:

“Universal Pictures Corporation, New York, has been ordered to pay according to the court files 25.U.5849/30 of the District Court of Appeal the sum of RM 50,000 with 2% interest above the discount rate of the Reichsbank from July 1, 1926. The appeal against this judgment of the District Court of Appeal of July 27, 1932 has been denied by judgment of the Supreme Court of February 3, 1933. The judgment stands nominally in the name of Mayfilm Corporation in Liquidation; legally, I the undersigned film director, Joe May am entitled to this claim. My rights concerning this claim are founded upon an agreement between myself and Julius Aussenberg, business man, dated August 29, 1930 according to which this claim

(Deposition of Dr. Erich Lenk.)

against Universal Pictures Corporation was transferred and assigned to me besides other assets of Mayfilm Corporation.

With these premises I hereby assigne the above mentioned claim and judgment to its full extent and with all interest and other rights to the Bank of Foreign Commerce in Berlin SW, Markgrafenst. 41.

Berlin, February 9, 1933.

(Signed): JOE MAY."

As further security for the above mentioned claim against Mayfilm we hold the guarantee of Fritz Mandl, Director General, Hirtenberg, Lower Austria. We have made claim against Fritz Mandl, Director General, based upon this guarantee and he has satisfied in full all our claims against Mayfilm Corporation. Based upon this fact according to the provisions of the German law (Paragraph 774 Civil Code) all rights with all securities are transferred to the guarantor who satisfies the claim of the creditor against the principal debtor. Therefore the claim against you in the amount of RM 50,000 together with 2% interest above the discount rate of the Reichsbank from July 1, 1926, which had been assigned to us has been transferred to the above mentioned Fritz Mandl, Director General, at Hirtenberg, of which fact we are notifying you

(Deposition of Dr. Erich Lenk.)

herewith. You can satisfy this debt only by payment to the above named.

Very truly yours,

BANK OF FOREIGN
COMMERCE.

The forementioned signatures of:

1) Dr. Erich Lenk, member of the board of directors.

2) Kurt Schlesinger, bank manager, both at Berlin W 8, Markegrafenst. 40, who have been authorized jointly to represent the Bank of Foreign Commerce at Berlin are hereby acknowledged.

The foregoing signature of Notary Sigmund Gorski is acknowledged with the remark that he is authorized to certify the document and that the certification is according to the laws of the country.

Berlin, February 27, 1936.

The Presiding Judge of the Superior Court.

(Seal of Superior Court)

By (Signature illegible)

545.36.

8 Reichsmark fee for acknowledgment paid.

Berlin, February 27, 1936.

Office of Superior Court Clerks Department.

(Signature illegible.)

[Endorsed]: Filed Feb. 24, 1940.

H. A. GEBHARDT,

recalled as a witness in behalf of plaintiffs, testified further as follows:

Cross Examination

Q. By Mr. Selvin: Dr. Gebhardt, you were in Germany last year? A. I was.

Q. How long were you there?

A. Four months, approximately.

Q. At that time, of course, this matter of the alleged claim of Fritz Mandl against Universal Pictures Corporation had been referred to you, had it not?

A. It had been referred to me quite a time previous.

Q. And the matter was still pending at the time of your trip to Germany? A. It was.

Q. Did you undertake to examine any records with respect to this claim while you were in Germany?

Mr. Hirschfeld: To which we object on the ground that it is incompetent, irrelevant and immaterial. There is no duty upon Dr. Gebhardt to go and examine that claim, whatsoever. [94]

The Court: I will sustain the objection. There is no showing that they were gathered according to his instructions.

Q. By Mr. Selvin: I call your attention to Section 774 of the Civil Code of Germany, Dr. Gebhardt, which you purported to translate in the

(Testimony of H. A. Gebhardt.)

course of your direct examination. You left out the last sentence of that section, did you not, relating to the proposition that as between themselves co-sureties' rights are the same as those of debtors?

A. I translated the entire section.

Q. Isn't there a sentence at the end there——

A. Oh, pardon me.

Q. ——the meaning of which, in English, is substantially [95] this: Co-guarantors are only liable towards each other under Section 426?

A. That is right.

Q. Will you turn to Section 426 of the German Civil Code?

Q. By Mr. Selvin: Doesn't Section 426 provide, in effect—I will read the English. You have the original in German before you?

A. Yes.

Q. "The joint debtors are, in their relation to each other, indebted in equal parts, unless it is otherwise provided. If the part falling on a joint debtor cannot be obtained from him the deficit shall be borne by the other debtors liable. In so far as the joint debtor satisfies a creditor and is entitled to claim contribution from the other debtor, the claim of the creditor against the other debtor is transferred to him. The transfer cannot be availed [96] of to the injury of creditor." Is that a substantially correct translation of Section 426?

A. That is substantially correct.

(Testimony of H. A. Gebhardt.)

Q. Isn't this the effect of that, under the German law: That when one of two co-guarantors pays the principal debt or claim guaranteed, he is entitled to receive from the other debtors the amount of the contribution to which they are liable?

A. The amount of the contribution—— [97]

A. In my opinion that means that if one of the guarantors pay the share above the share of the guaranty, he can take recourse against the other guarantor.

Q. By Mr. Selvin: And in the absence of agreement the co-guarantors are presumed to be equally liable for the guaranteed obligation as between themselves? [98]

A. As between two guarantors, yes.

Q. That is what I am talking about.

A. That is correct.

Q. Of course, the law of Germany, Dr. Gebhardt, is not founded on the common law of England, is it? A. It isn't.

Q. However, the courts of Germany do render decisions or opinions, giving the grounds for the particular decisions which they reach, in some cases, at least?

A. I didn't get that. May I have it?

Q. Well, the courts of Germany do render decisions, and in that connection they render and publish opinions in pretty much the same way as do our own courts here, do they not?

(Testimony of H. A. Gebhardt.)

A. The Supreme Court decisions are published in book form.

Q. And those decisions consist of discussions of the facts in the particular case and the law applicable to that case? [99]

A. Judgments of the Supreme Court are printed and contain decisions and grounds for decisions.

The Court: While they are not binding and there is no principle like our doctrine of stare decisis, because each judge is supposed to follow his own view of the law, nevertheless, by comity——

A. They have great weight.

The Court: ——the judges follow the higher court, just as I will follow even good dictum of the Supreme Court of the United States; is that right?

A. That is exactly the same.

Mr. Selvin: Thank you, your Honor. You have concluded my cross examination.

The Court: All right.

Mr. Selvin: That is all I have at the present time.

Mr. Hirschfeld: Due to the seemingly unending courtesy of Mr. Selvin in this matter, as stated to me earlier in the day, that the amount of money that we are concerned with here, should it become material—and I think he will never agree that it will ever become material—may be determined by Mr. Riedlin, the Assistant Vice President of the Bank of America. He has sent to me a letter with

(Testimony of H. A. Gebhardt.)

various computations, and in lieu of introducing the direct testimony of Mr. Riedlin as to exchange rates or as to discount rates, the documents may be introduced, with the reservation that they are subject to correction for arithmetical errors. [100]

Mr. Selvin: I will stipulate that you may introduce this letter in lieu of Mr. Riedlin's testimony, in that if called he would testify, in substance, to the facts stated in the letter.

The Court: All right. It may be so received.

The Clerk: Plaintiffs' Exhibit 12. [101]

(Testimony of H. A. Gebhardt.)

PLAINTIFFS' EXHIBIT No. 12

Cable Address—Bamerical

13044

Bank of America

National Trust and Savings Association

Please Address Reply to

International Banking Department

660 South Spring Street

Ref.

London Office

12 Nicholas Lane

London E. C. 4

Los Angeles, California

Sept. 24, 1940.

Mr. Ellis I. Hirschfeld,
Suite 1215 Bankers Building,
629 South Hill Street,
Los Angeles, California.

Dear Mr. Hirschfeld:

In accordance with your request I have computed interest on an amount of 50,000 marks from July 1, 1926 to September 24, 1940 inclusive at the official discount rate of the German Reichsbank plus two per cent. The result amounts to Rm. 52,574.33 as per attached detailed statement.

I have also consulted past records and have found that the German Reichsmark was quoted in this country at the following rates:

(Testimony of H. A. Gebhardt.)

July 1, 1926	23.81	per hundred Reichsmarks		
March 4, 1930	23.86	“ “ “		
July 27, 1932	23.72½	“ “ “		
Feb. 23, 1933	23.93½	“ “ “		
Jan. 2, 1937	40.25	“ “ “		
Jan. 2, 1938	40.29	“ “ “		
Sept. 24, 1940	40.20	“ “ “		

You will find enclosed also a detailed statement showing the discount rates of the German Reichsbank from July 1, 1926 up to date. I sincerely hope that this information will be sufficient for your purposes.

Yours very truly,

G. RIEDLIN

Assistant Vice President.

GR:deh

Enclosure.

(Testimony of H. A. Gebhardt.)

Discount Rates of the German Reichsmark
June 7, 1926—Sept. 24, 1940

June 7, 1926	6½%
July 6, 1926	6
Jan. 11, 1927	5
June 10, 1927	6
Oct. 4, 1927	7
Jan. 12, 1929	6½
Apr. 25, 1929	7½
Feb. 11, 1929	7
Jan. 14, 1930	6½
Feb. 5, 1930	6
Mar. 8, 1930	5½
Mar. 25, 1930	5
May 20, 1930	4½
June 21, 1930	4
Oct. 9, 1930	5
June 13, 1931	7
July 16, 1931	10
Aug. 1, 1931	15
Aug. 12, 1931	10
Sept. 2, 1931	8
Dec. 10, 1931	7
Mar. 9, 1932	6
Apr. 9, 1932	5½
Apr. 28, 1932	5
Sept. 22, 1932	4
Apr. 9, 1940	3½

Mr. Hirschfeld: If your Honor please, we will call Mr. Joe May for one or maybe two questions.

[103]

The Court: All right.

JOE MAY,

called as a witness in behalf of plaintiffs, being first duly sworn, testified as follows:

The Clerk: State your name.

A. Joe May.

Direct Examination

Q. By Mr. Hirschfeld: Mr. May, you are the Joe May who is described and mentioned throughout these proceedings? A. Yes, sir.

Q. Did you ever pay any money to the Bank fuer Auswaertigen Handel on an obligation based upon moneys loaned to the May Film A. G.

A. I paid a little amount for the May Film and then I couldn't pay any more.

Q. I am talking about you personally. Did you personally, of your own money, ever pay the moneys due to the bank from the May Film Company?

A. This question as you put it to me, I paid about 7,000 marks. That was all.

Q. For the May Film Company when you were director of the May Film Company or out of your own pocket book? I am talking about what you paid out of your private money; not what was paid for the May Film Corporation. Did you ever [104] pay that money to the May Film Corporation, that was borrowed? A. No.

Q. Do you know who did? A. Yes.

Q. Who? A. Mr. Mandl.

Mr. Hirschfeld: That is all.

(Testimony of Joe May.)

Cross Examination

Q. By Mr. Selvin: How much had the May Film paid on that loan before Mr. Mandl paid?

Mr. Hirschfeld: That is incompetent, irrelevant and immaterial.

The Court: No. Overruled.

A. Maybe—the judge said “Overruled”.

Mr. Hirschfeld: That means you may answer.

A. That was 30,000 or 40,000.

Mr. Hirschfeld: Marks or dollars?

A. 30,000 marks or 40,000 marks. I don't know exactly how much.

Mr. Selvin: That is all. [105]

Mr. Selvin: Counsel has asked me if I will stipulate to offer, as a part of Exhibit 5, a return registry card, which I am willing to stipulate is the return receipt for the letter which is in evidence as Plaintiffs' Exhibit 5. This can be made part of the exhibit.

The Court: It may be made part of the exhibit.

Mr. Selvin: I understand that counsel are willing to stipulate that the letter which I am about to offer, dated March 4, 1936, on the letterhead of Universal Pictures Corporation, signed by Willard S. McKay, was in fact written by him; that he was at that time general counsel for that corporation

and that the letter was received by the addressee in due course of the mails. I offer that letter in evidence; it being the reply to Plaintiffs' Exhibit 5.

The Court: It may be received.

The Clerk: Defendants' Exhibit B. [116]

DEFENDANTS' EXHIBIT B

Universal Pictures Corporation
Rockefeller Center
New York

Willard S. McKay
General Counsel

March 4th, 1936

Ratzer, Bridge & Gebhardt, Esqs.,
311 South Spring Street,
Los Angeles, Cal.

Gentlemen:

We are in receipt of your letter of February 25th, enclosing a letter from the Bank Fur Auswartigen Handel Aktiengesellschaft, together with what purports to be a translation.

Universal Pictures Corporation has never recognized the validity of the claim in question.

Very truly yours,

WILLARD S. MCKAY

[Endorsed]: Filed Sept. 25, 1940.

The Court: All right.

Mr. Selvin: I next offer, as part of one exhibit, certified copies of, first, a judgment of the Landgericht in Berlin, Germany, in an action between Universal Film, Aktiengesellschaft, as plaintiff, and May Film, Aktiengesellschaft, as defendant, it being dated the 6th of December, 1935; and a judgment of the Kammergericht, dated April 30, 1936, in an action between the same parties, it being the same case on appeal.

Mr. Hirschfeld: We want to object on the ground that it is incompetent, irrelevant and immaterial.

Mr. Blum: It does not pertain to the subject matter of this lawsuit. It appears to be a different lawsuit, entirely, between the parties. [117]

The Court: Objection overruled. It may be received.

The Clerk: Defendants' Exhibit C.

Mr. Blum: Exception. [118]

The Court: Objection overruled. [119]

E. O. F. GOLM,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: E. O. F. Golm.

Direct Examination

Q. By Mr. Selvin: You live in Los Angeles, Dr. Golm? A. Yes I do.

Q. Did you ever reside in Germany?

A. I did.

Q. For what period of time?

A. From my birth in 1885 up to the end of 1937.

Q. What profession did you follow in Germany?

A. I followed the judiciary profession.

Q. For what period of time?

A. I commenced to study law in 1904, first in Switzerland and then at the University of Berlin. I passed the first bar examination in 1907 and the so-called State Board examination, which is the final examination, in 1912.

Mr. Hirschfeld: We will stipulate to the witness's qualifications.

The Court: I think we should.

Mr. Selvin: I think the court should know something about it.

The Court: They use terminology a little different than [120] we do here, so it is just as well for the Doctor to explain to us what position he had.

(Testimony of E. O. F. Golm.)

A. Well, from 1907 until 1912 I worked in the so-called Preparation Service which is called the Referendar. I was appointed gericht's assessor in 1912. That is I qualified to be appointed as a judge in Germany in 1912 and I worked for a certain time in the office as a commissioned prosecuting attorney then was appointed judge for lifetime in Germany by the former King of Prussia in 1917. If the court wants to see this——

The Court: I don't think it is necessary. I am familiar generally with the training that the judges receive in Germany. It is quite different from our system.

A. I was a judge in Germany from 1912. In fact, I was appointed as judge, for lifetime, from 1917 on. And I worked as judge at different offices, municipal court and superior court, and also was chief justice of our so-called Schwurgericht. The grand jury would be the corresponding term in English. Presiding judge of the grand jury—I am not quite sure about this. We had grand juries at this time and presiding judges. And I also worked for many years in the government, in the Ministry of Justice in Berlin, in the Administration and in a court which specially dealt with crimes committed by officials, and my official title was Landgerichtsrat at that time. Later on I resigned from my official position as a judge and worked [121] as a lawyer and notary in Germany until I left Germany for

(Testimony of E. O. F. Golm.)

this country, which was in 1937. I was, upon my application, discharged from this position when I arrived in this country in December, 1937. I think it was the 3rd of December. I am not quite sure.

Q. By Mr. Selvin: As a judge in Germany, you sat, did you not, in cases of the sort that we would call civil cases?

A. Oh, yes, for years. And I also had taught law. I had a special order given to me by the administration to teach law to the Referendar, which means to the students who are ready to graduate in the preparatory service.

Q. Were you ever a judge of the Amtsgericht in Charlottenburg?

A. Yes, I was; but, in fact, at that time I worked in the Ministry of Justice, so my office was taken by a person to replace me.

Q. Are you familiar with the official seal of that court? A. Yes. [122]

Q. Dr. Golm, in preparation for your testimony in this case on the German law you have read and studied, have you not, the judgments which were rendered in the action between May Film Aktiengesellschaft and Universal Pictures Corporation, [129] which are included as part of Plaintiffs' Exhibit 1 here? A. I did.

Q. You have also read and studied the judgment rendered in the action between the Bank for Foreign Commerce and May Film Aktiengesell-

(Testimony of E. O. F. Golm.)

schaft, which is in evidence here as Plaintiffs' Exhibit 3, I believe; the declaratory judgment?

A. I did likewise.

Q. Dr. Golm, under the law of Germany during the period involved here, let us say from 1926 to 1936, what was the status of an ordinary business corporation?

A. Well, we have different kinds of business corporations, which are *persona juris*, which means a stock company, an association with limited liability, cooperative associations, and so on. As far as the stock company is concerned, I think it is the only one which appears in this trial.

Q. Is a stock company the one that is known in German as "Aktiengesellschaft"? [130]

A. "Aktiengesellschaft" is the correct translation of the stock company.

Q. And as I understand it, in German law *persona juris* is a legal entity?

A. Yes. A stock company, as far as organization is concerned, must have a so-called *vorstand*; that is, a governing body. It must have an *aufsichtsrat*. That means a board of supervisors. It must have a meeting of the members, or in German, *mitgliederversammlung*. All these three are organs of the *aktiengesellschaft*.

Q. Such corporations have what we call stockholders in this country?

A. Yes, they have stockholders.

(Testimony of E. O. F. Gohm.)

Q. Under the law of Germany do the stockholders have any title or interest in and to the property of the corporation?

Mr. Hirschfeld: We would like to adhere a little more closely to the rules for testifying to foreign law by experts. We would like to know what, in his opinion, is written law; and for that purpose I would like counsel to have the witness designate the code law or citations as to these laws, rather than accept his interpretation or his opinion.

The Court: That is cross examination. An expert may give his opinion as to what the law is. Then it is on cross examination that you can have him designate particular [131] sections.

Mr. Selvin: Read the question.

(Question read by reporter.)

A. Well, the stockholders, as such, have no title or right whatsoever to the property of the corporation. They have an interest, indirectly, in so far as they are holding stocks or shares of the company, which represent a share in the property of the company as a whole; but they have no title or right whatsoever to dispose of the property belonging to the company.

Q. Do your answers in that regard apply to property which is in the form of a claim against another person, rather than a firm or some corporeal or tangible property?

(Testimony of E. O. F. Golm.)

Mr. Hirschfeld: I object to the question as calling for a conclusion of the witness.

The Court: Objection overruled.

A. The notion or conception of property literally translated would mean eigentum, and this is a notion which is applicable only to corporeal things. If it is a claim we don't speak about eigentum, at least not in the proper terminology of law, but we use another term for the holder, which is inhaber. That means he holds a claim, or in English you would say he owns a claim.

Q. By Mr. Selvin: Do your answers, with respect to the interest or lack of interest of the stockholders in the property or assets of the corporation, apply in the same way [132] to claims which a corporation holds?

A. Certainly they do; certainly.

Q. What act or acts would have to be performed under the law of Germany, in order to effect a valid transfer to a third person, who is also a stockholder of a business corporation, of a part of the corporation property or rights which it owns or holds?

A. Provided there isn't a special rule in the statutes of the company, the organ which represents the company, the legal representative of the company is the only competent one to dispose of such property or claims and to assign or transfer property or claims to a third person. And in this

(Testimony of E. O. F. Golm.)

connection it doesn't make any difference whether this third person is a stockholder or is a third person which doesn't hold any stock or doesn't have any interest whatsoever in the company; even not an economic interest.

Q. Would an agreement between two stockholders of a company, in which between the two of them they owned all of the stock, with respect to the transfer or disposition of a part of the company's assets to one of the stockholders, have any effect as a transfer of those assets, in German law, without any act of the governing body in the execution of a document of transfer or assignment in pursuance of that act?

A. It would not have any effect in this meaning. It would create certain obligations between the two stockholders, [133] but it would not have any effect binding upon a corporation or binding upon anybody else, as far as a transfer of this property or claim is concerned.

Q. Dr. Golm, for the purpose of expressing an opinion as to the German law I want you to assume certain facts to be true; assume them for the purpose of a question only. Let's assume that about the 10th of May, 1926 an American corporation enters into a contract with a German business corporation, which contract provided by its terms that it was to be governed by the laws of Germany, the contracts further provided that in

(Testimony of E. O. F. Golm.)

case of any violations of the contract the violating party must pay to the faithful party a contractual penalty of 50,000 marks. Prior to the year 1930 but after the contract was entered into the American corporation violated the contract, under circumstances entitling the German corporation to the contractual penalty of 50,000 marks. That an action was commenced in the Landgericht of Germany against the American corporation for the purpose of recovering and enforcing that contractual penalty of 50,000 marks. That on or about March 4, 1930 the Landgericht rendered a judgment that the German corporation was not entitled to recover the contractual penalty. That shortly after the rendition of that judgment and while proceedings to carry the case on in the Kammergericht were pending, two persons—we will call them, for the sake of our hypothetical question, Joe May and Julius Aussenberg; [134] Joe May being at that time a sole stockholder of the German corporation which is involved in our hypothetical lawsuit—entered into an agreement by which Aussenberg agreed to buy a part of Joe May's stock in the German corporation; and they also agreed, as part of that agreement, that in return for 45,000 marks, contributed to the assets of the corporation by Joe May, certain of the property and assets of the corporation should be assigned to Joe May, and that included in the assets, which were to be so assigned

(Testimony of E. O. F. Golm.)

under this agreement, was the claim of the German corporation against the American corporation for the 50,000 marks contractual penalty. Then let us assume that in due course the matter was heard and determined by the Kammergericht, which handed down the judgment on or about July 27, 1932, condemning the American corporation to pay to the German corporation the sum of 50,000 marks with interest in a certain amount. And let us assume that the judgment so handed down by the Kammergericht is the judgment of the Kammergericht which appears in this case as part of Plaintiffs' Exhibit 1, being the judgment in the action by May Film against Universal Pictures. That subsequently proceedings were taken by both parties, in the nature of a petition to the Reichsgericht, to review that judgment, which petition was rejected, so that the judgment of the Kammergericht became final. Assuming those facts to be true, do you have an opinion as to whether or not, under the law of Germany, the person we [135] have referred to as Joe May acquired any interest in or title to the claim of the German corporation against the American corporation?

Mr. Blum: I object to it as incompetent, irrelevant and immaterial. Counsel does not recite the full facts in the question involved here. It also attempts to express an opinion on or reexamine a judgment which has already been rendered in Ger-

(Testimony of E. O. F. Golm.)

many and has become final. It includes facts not in evidence and omit facts that are in evidence. It particularly does not include the fact that the sole director of the corporation consented to the particular transaction involved, towit, the sale of certain assets to an individual for a consideration, and that these facts have already been judicially determined by a court in Germany, and it is an attempt to go behind the judgment.

Mr. Selvin: Which determination in Germany are you referring to, the one in the case against Universal Pictures Corporation in which it was decided that these facts did not constitute a transfer?

The Court: I think counsel refers to a judgment to which Universal Pictures was not a party, which was sort of a friendly suit in which it was determined that Joe May was, in his individual capacity, the owner.

Mr. Blum: That is what I am referring to. And further, that it would attempt to impeach a final judgment.

The Court: The defendant here challenges the judgment [136] for various reasons; one of them being that Universal was not a party to the action; and he also challenges on the ground that it has no jurisdiction over the subject matter. If, under the law of Germany, a transfer of this character is not recognized the court that adjudicates the matter

(Testimony of E. O. F. Golm.)

is not only guilty of judicial error, but usurps jurisdiction in determining the matter.

Mr. Blum: There is no pleading in the file which goes to the jurisdiction.

Mr. Selvin: We deny the rendition of the declaratory judgment and plead affirmatively that it was not binding upon Universal Pictures for the reason that Universal was not a party to it.

The Court: I will overrule the objection. You have not indicated what facts are missing, and without that the objection is not valid.

Mr. Blum: There are no facts here showing whether the charter of this particular corporation did or did not prohibit the transfer.

The Court: The witness has testified that there are certain requirements, under the German law, as to what the rights are, regardless of the charter of organization.

Mr. Blum: My understanding of his testimony was, that unless it was prohibited by the charter; not that the charter requires it. The charter may determine it, but it isn't required to be in, or not to be in the charter. [137] Furthermore, there is not included within the question that the board of directors, to-wit, the sole director, approved of the transfer.

The Court: Well, I will add that to the question and ask that it be answered in the light of that addition.

Mr. Selvin: Do you understand the addition?

(Testimony of E. O. F. Golm.)

A. I understand the addition. The first part, assuming the facts given to me to be true, would be an agreement between—if it is permissible I would like to give the names of the two persons, Joe May and Aussenberg—by which agreement Joe May paid.

Q. Yes.

A. The intention of this agreement was that he should acquire certain assets belonging to the corporation, and among them the claim in question against Universal. There can be no doubt, according to the German law, that an agreement of such kind could never bring about a transfer of such assets, particularly of this claim, because neither Aussenberg nor Joe May were entitled to dispose of the claim. The claim belonged to another person, a persona juris, the Aktiengesellschaft, which is entirely different from the individual stockholder. And, of course, this agreement is not without any value. It has to be interpreted as to the will of the contracting parties. And this interpretation would lead, in this special matter which you wanted me to assume to be true, would lead to the conclusion that the parties intended to say that one of the contracting [138] parties, to-wit, Aussenberg, would no longer be interested in those assets, but that Joe May—

Mr. Blum: Your Honor, I don't want to interrupt—

(Testimony of E. O. F. Golm.)

Mr. Selvin: Then please don't. Let him finish his answer.

Mr. Blum: The witness here is not giving an interpretation of German law. He is trying to give his opinion of what the case would be.

The Court: That is what he is an expert for. Objection overruled. You may cross-examine Dr. Golm on his opinion.

The Witness: I wanted to say that in our law there is a special provision which says that in cases like this there must be an interpretation of this agreement. And I wanted to add to which effect this interpretation would lead, which effect has been interpreted already by the Kammergericht in this case.

Mr. Blum: I object to that and ask that that last be stricken. He is answering as to a hypothetical question.

The Court: Yes.

The Witness: Now, as I understand, I should furthermore assume the fact that the governing body consented to this agreement.

Q. By Mr. Selvin: Let me ask you about that.

The Court: He will ask the question, Dr. Golm.

Q. By Mr. Selvin: Let us assume this: In addition to the agreement of the stockholders, assumed in the prior [139] question, that the governing body of the German corporation consisted of only one person, and in our hypothetical ques-

(Testimony of E. O. F. Golm.)

tion let us call that person Johanna Loewenstein. Let us assume that Johanna Loewenstein knew that there was such an agreement between the two stockholders and that she had no objections to signing an intermediate balance sheet of August 15, 1930, which was after the date of this agreement between the stockholders, and agreed to the contents of the agreement between the two stockholders. And that in this intermediate balance sheet which she signed, and according to this intermediate balance, Joe May paid to the German corporation 45,000 marks, and there was assigned to him, in consideration, the assets, including the lawsuit against Universal Pictures. Assuming those facts, in addition to the facts previously assumed, would there be any difference in your answer?

A. There would be a slight difference in the answer. Of course, this question couldn't be answered generally in an affirmative or a negative manner, because the assigning of a balance sheet, an interim balance sheet, as far as I understand, does not replace a real assignment. In order to make this transaction valid the governing body, in this case Mrs. Johanna Loewenstein, would have had to transfer the claim from the May Film Corporation to Joe May. However, if this claim was mentioned as to being transferred to Joe May in the interim balance sheet, and if Johanna Loewen-

(Testimony of E. O. F. Golm.)

stein, [140] as the only member of the governing body, did consent to this balance sheet, then it could be concluded, by means of interpretation also, that notwithstanding and apart from the foregoing agreement she wanted to assign this claim to Joe May, and this assignment could be considered as valid. In order to answer the question completely I would have to see the balance sheet and the contents of it, because otherwise it couldn't be answered in a very decisive manner.

Q. But would this be true. That until such time as there was what you call a real assignment executed by the governing body of the corporation, would there have been effected, under the German law, any transfer to Joe May of the claim?

A. No, it would not. The assignment of the governing body, the only organ of the stockholder company which has the right to dispose of the property, is indispensable for a transfer of a claim to a stockholder.

Q. Would the mere fact that the governing body knew that an agreement for such assignment had been made between the stockholders, and made no objection to it, take the place of a real assignment?

A. The knowledge alone would not take the place.

The Court: Suppose she had approved, in this interim balance sheet, the agreement. Would that

(Testimony of E. O. F. Golm.)

be effective as an assignment or would that merely be sort of an agreement to do something in the future, to legalize it? [141]

A. In order to really answer this question you would really have to know what she had in mind when she consented to this agreement. She could have in mind that she wanted to assign the claim, but she also could have in mind that she assented to the agreement between the two stockholders, on the basis on which one of them was no longer interested in the assets, and the proceeds of these assets had to be to his benefit.

The Court: My question would be this: Would it be effective, as an agreement on her part, to complete the transaction at some future time through proper legal documents?

A. At least to this degree: That she was under the obligation to deliver the proceeds coming out of this claim to him in case she consented to the agreement.

The Court: Would the right of any intervening creditor affect such a promise?

A. It would.

The Court: It would? A. Yes.

Q. By Mr. Selvin: That is, if between the time of the making of the promise and the receipt of the proceeds there were creditors of the corporation which came into being?

A. This is a question as to a term which we call relatively valid; whether this agreement was

(Testimony of E. O. F. Golm.)

both invalid against the creditor, as interested in the assets of the debtor of the May Film [142] A.G., and it was valid against any other third person.

The Court: In discussing the problem of the relationship of the members of a corporation of this character; that is, the stockholders, aktionare, you didn't say anything, Doctor, about the right of creditors. I assume that, in addition to any proprietorship, in fact, over and above the rights of stockholders to the assets of the company, are the rights of creditors——

A. They certainly are.

The Court: ——to the satisfaction of whose debts the assets must be applied before stockholders can assert any right. Isn't that generally the law of Germany? I assume it is the law of every civilized country.

A. It is the law of Germany, with certain restrictions. We have this law: A transaction can be valid between two persons or between other persons, but at the same time not be valid if the creditor——

The Court: We have the same. We have all sorts of transactions which are valid—we use the Latin term *inter sese*—and not valid as to third parties, in so far as they affect the right.

The Witness: Your Honor, we have the term *anfechten*, attack. The creditors may *anfechten*——

The Court: Challenge?

(Testimony of E. O. F. Golm.)

The Witness: Yes. Such a transaction by the debtor in fraudem of the creditors, with the effect that it has to be considered to be void in so far as the rights [143] of the creditors are concerned.

The Court: Is there a provision, for instance, in the law that before all the assets of a corporation, or a substantial portion of the assets—say a claim of 50,000 marks, which is a sizable sum of money—may be assigned to one of the directors, or to someone else, that any kind of notice must be given to creditors? Have you any such thing requiring notice to creditors before assets are distributed to stockholders, such as exist in the corporations of many states?

The Witness: We have, your Honor, the general rule which provides this, and this is the point which I had in mind when I first referred to the statutes of the corporation—it usually says in the statutes, and is a rule which applies to the case of liquidation—and this rule says that, first, the debts of the company have to be paid before the liquidator may dispose of any assets. And it means, furthermore, that in the relation to the liquidator a disposal of assets would be invalid.

The Court: I see.

Q. Mr. Mr. Selvin: Upon the facts which we assumed in my first question, Doctor Golm, do you have an opinion as to whether or not the party, that

(Testimony of E. O. F. Golm.)

we referred to in the hypothetical question as Joe May, acquired, by reason of those circumstances, any interest in or title to the judgment of the Kammergericht, as distinguished from the claim upon [144] which the judgment is founded?

A. In German law you cannot transfer a judgment, as such; that means the document. You can transfer only the claim, and the title to the judgment follows the title to the claim.

Q. So that if no title to the claim was acquired none was acquired to the judgment?

A. That is impossible.

Q. Upon those same facts, and assuming the opinions you have already expressed are in force, does it follow that no person could acquire title to the judgment from or through Joe May?

A. I understand I should assume this to be true: That Joe May did not acquire the claim against Universal; whether another person could acquire this claim from him?

Q. That is right.

A. This question has to be answered in the negative, without any doubt.

Q. Is there any procedure, under German law, for effecting a transfer on the record of a judgment, or at least of the right to enforce a judgment, from the judgment creditor to some other party?

A. Supposing in the case the party has a judgment, which means really that the party has a claim

(Testimony of E. O. F. Golm.)

against a certain debtor which has been confirmed and made enforceable by a judgment. There is a legal way to have this claim and the [145] judgment transferred to a new creditor. This procedure is laid down not in the Civil Code, of course, but in the Code of Civil Procedure. However, to go a little bit into the details, if you want me to explain it: Every judgment in Germany which condemns a party to pay a certain amount has, in order to be enforced by way of execution, to bear a so-called vollstreckungsklausel; that means to bear a certain writ of execution. This writ of execution is essential, if a judgment is intended to be enforced, compulsory by the creditor. Now, if the creditor wants to transfer the claim and the judgment, then the new creditor, the assignee, has to bring in a motion with the proper court, the court of execution, to have the writ of execution transferred to him. That is a provision in our Code of Civil Procedure. And this provision also states that the new creditor, who wants to have this writ of execution to be transferred to him, has to prove his rights by documents publicly certified or attested. If he can't prove the transfer of the claim to him by those documents, in order to obtain the transfer of the writ of execution, then he has to institute a special action before the Court of Civil Procedure, and this action has to have the motion, "May it please the court to give the order that the writ of execution contained in

(Testimony of E. O. F. Golm.)

this judgment may be transferred to the new creditor," which is the plaintiff in the new action. This is the way in which it has to be done. In this procedure he is not bound to produce only public [146] documents, but he can also rely on other means of evidence and proof.

Q. In this action, which he brings for the purpose of having the writ of execution transferred to him, who are the necessary parties to that action, under German law?

A. The new creditor, which wants to have it transferred, is the plaintiff; and the debtor against the writ of execution, which has been issued by the court, is the defendant.

Q. In other words, then, translating it into the terms of our own case, if Joe May or some successor of Joe May desires to have transferred to him the writ of execution arising out of the judgment against the Universal Pictures Corporation, it would be necessary, in an action brought for that purpose, to have Universal Pictures Corporation as the defendant?

A. Well, the first thing would be that Joe May or his legal successor would submit the judgment and an assignment of the claim awarded in the judgment to him and ask for a transfer of the writ of execution.

Q. That can only be done if the transfer is what you call publicly attested documents?

(Testimony of E. O. F. Golm.)

A. Yes. If the court denies this, then he has to institute an action.

Q. And that action, in our case, would have to be against Universal Pictures Corporation?

A. Both procedures against Universal Pictures [147] Corporation.

Q. Until that is done, until there has been a transfer by reason of the granting of the motion to transfer, or a transfer by reason of a successful judgment against the judgment debtor, has the alleged or claimed transferee ever any right, under German law, to enforce or collect the judgment?

A. He couldn't have any right, because the writ of execution doesn't bear his name. And the authorities in Germany, which have to deal with the execution, would simply refuse to execute the judgment, because a judgment can only be executed in favor of a party which is a litigant party or a legal successor, after the writ of execution has been transferred to him. [148]

Q. By Mr. Selvin: Dr. Golm, this morning, in the course of your testimony, you used the phrase, "writ of execution." Will you explain a little bit more fully just what the significance of that phrase is, as used in the German law?

A. Well, I want to translate our German word "vollstreckungsklausel", which is defined literally in Section 725 of the German Code of Civil Procedure. This means that every judgment, to be enforced by way of execution, has to have this voll-

(Testimony of E. O. F. Golm.)

streckungsklausel, an authorization given by the court's clerk, in certain cases by the judge himself, to the party who executes the judgment, and the party presents this—I will use the German word again—vollstreckungsklausel to the sheriff or to the court of execution whenever this party wants to execute the judgment. As far as I know, in American law, the writ of execution is not given to the party who wants to execute the judgment. It is given to the sheriffs directly. Therefore, maybe the translation “writ of execution” might not be the literal term for “vollstreckungsklausel”, but I don't know if there is a better word to use. The Latin word would [150] be “clausula executorie.” I think the German law gives the translation “writ of execution,” as far as I recall. Anyway, it is the thing which most resembles our vollstreckungsklausel, as defined in Section 725 of the German Code of Civil Procedure.

Q. Is there any such thing in the German procedure as enforcement of a judgment by another action brought upon that judgment?

A. There is, in cases like this, for instance; if a foreign court, a court of a foreign country, has rendered a judgment, and the reciprocity is guaranteed between the two countries, then the party who wants to enforce, by way of execution, the judgment of a foreign court, may institute some kind of an action based upon a res adjudicata. That is pro-

(Testimony of E. O. F. Golm.)

vided for in section, I think it is 744. It is in the same part of this—it is Section 722 of the German Code of Civil Procedure, where there is an action based upon another judgment in order to enforce it by way of execution.

Q. Is that applicable to domestic judgments? Is there such a procedure as enforcing a German judgment, in Germany, by another action?

A. No. If a judgment has been rendered in the case and it is enforceable by way of execution there is no other action based upon *res adjudicata*, because it isn't needed. [151]

Q. By Mr. Selvin: Doctor, I am going to show you Plaintiffs' Exhibit 3 in this case, which purports to be the record in the case of the Bank for Foreign Commerce against the May Film Company, and call your attention to what is marked page 3, and is also marked page 181, of that record——

A. Well, that is only for the photograph copy.

Q. In any event, we identify the page by the number at the top, which is 3, and in the lower left-hand corner it bears the numerals 181. There is, on that page, what purports to be an agreement, a copy of the agreement between Joe May and Charles Aussenberg respecting the transfer of the assignments of the May Film Corporation. You have read that, have you not?

A. Yes, I read this.

Q. For the purpose of my question let us assume

(Testimony of E. O. F. Golm.)

that this quotation is, in fact, the agreement between Joe May and Aussenberg. I call your attention to another page, which at the bottom bears the numerals 184, where there is what purports to be the balance sheet of August 15, 1930. Let us [152] assume, for the purpose of my question, that that was in fact the balance sheet of that date of the May Film Corporation. Let us assume further that Miss Johanna Loewenstein, the sole member of the governing body, approved this balance sheet. Let us assume further that the agreement of which Miss Loewenstein had knowledge and to which she assented, according to her testimony in this case, was the agreement to which I call your attention on page 181. Assuming all those facts do you have an opinion as to whether or not those facts would be effective, under the law of Germany, to transfer or assign to Joe May the claim of May Film against Universal? A. I have an opinion.

Mr. Hirschfeld: To which we object, if your Honor please, on the ground that it is incompetent, irrelevant and immaterial. The particular ground that we would like to rely upon here, in addition to the general objection, is that it attempts to go behind a judgment. The documents that have been read are contained within a judgment roll upon which a judgment has been rendered by a court of competent jurisdiction. The witness is now asked to decide whether or not that judgment of that court is proper.

(Testimony of E. O. F. Golm.)

The Court: But unless that judgment is a judgment in rem, which bars the persons, it may be attacked collaterally in any proceeding by a person who is not a party.

Mr. Hirschfeld: Of course, your Honor, we are basing our [153] contention on the theory that, first, it is a judgment in rem.

The Court: I have not yet decided that question in your favor. If I follow the reasoning of the Ninth Circuit Court of Appeals, that a judgment of the court of the United States is not *res adjudicata* as to outside parties, I shan't decide in your favor. That second judgment determines that May Film is not a judgment creditor, but that Joe May was.

The Court: I am not questioning it, but I am just saying that, because if that judgment is a final judgment which binds them there is no defense left. You see, it is admitted that these courts are courts of competent jurisdiction and it is admitted that these judgments have been rendered.

Mr. Hirschfeld: I don't want to urge at length that objection, but I do want it——

The Court: To protect your record.

Mr. Hirschfeld: Yes; so that we could be heard to say we have saved it. I simply ask for that leave, to move to strike, it being understood that it is reversed, when this is further developed.

The Court: Objection overruled.

(Testimony of E. O. F. Golm.)

Q. By Mr. Selvin: Will you state what that opinion is [154] and the reason for it?

A. It is an agreement which is only partly quoted here.

Q. It is only partly quoted, but it apparently purports to be a quotation of all that relates to that transfer, does it not?

A. Yes, that is right. It doesn't say anything about a transfer concerning the claim against Universal from the May Film A. G. to Joe May. It says that certain assets, which are necessary for the new production, are reserved for the company, and that other assets have to be—well, it says, "Have to be acquired by Joe May." The balance sheet does not mention the claim against Universal, either, but only gives the figure, telling us to which amounts they were assets and to which amounts they were liabilities. The balance sheet, by the way, is an interim balance sheet, as is shown by itself. In my opinion, and I am pretty sure about that, I would never consider this as an assignment of a claim—of a special claim to Joe May. The second part of the question: I was asked, assuming the fact to be true that Miss Johanna Loewenstein has agreed to this agreement between Mr. May and Mr. Aussenberg, did this agreement constitute an assignment—a transfer of the claim. I would also answer no. And I can answer, from my long experience, that I have never seen an assignment

(Testimony of E. O. F. Golm.)

made by a governing body of an aktiengesellschaft in this way, in consenting to an agreement thereto which, as it is said, he will refrain [155] from any interest one person has to acquire certain assets which are not specifically named, the dubious assets.

Q. By Mr. Selvin: What, in your opinion, Dr. Golm, would be necessary, in addition to that agreement, the balance sheet and Miss Loewenstein's assent thereto, in order to effect a transfer of the claim to Joe May?

A. Miss Loewenstein's assent to this agreement has the legal meaning that she, as far as her capacity as the only member of the governing body is concerned, has no objection to this agreement. It can't mean anything else. Now, if she wants to execute this agreement in order to make complete Mr. Joe May's acquisition, she would have to draw an assignment which would read, for instance, "In execution of this agreement I hereby assign a claim against Universal to Mr. Joe May in my capacity as the only member of the governing body."

Q. Dr. Golm, using the term "judgment in rem" in the sense of a judgment or decree, by a court, which is conclusive evidence against the entire world of the fact or facts [156] which it determines or adjudicates, is there any such thing as that in the German law?

A. I wouldn't say that there was no such thing in the German law, because there might be a judg-

(Testimony of E. O. F. Gohm.)

ment concerning the status of a person, such as whether a person is a legitimate child or whether a person is the child of a certain father. That would be binding upon everybody. And if you call that a judgment in rem I would say there is such a thing.

Q. Using the term "judgment in rem" in the sense in which I have indicated, would a judgment in Germany between two parties, declaring one of them rather than the other to be the owner of a certain claim, be a judgment in rem?

A. There would be no doubt that it could never be a judgment in rem. Never, under no conditions.

Q. The judgment of the Landgericht, which is in evidence here as part of Plaintiff's Exhibit 1, that is the judgment between the Bank for Foreign Commerce and May Film—

A. Yes, I know this judgment, because I translated it.

Q. In your opinion is that judgment a judgment in rem, using the term "judgment in rem" in the sense which I have indicated?

Mr. Hirschfeld: We object to that on the ground it is incompetent, irrelevant and immaterial.

The Court: Overruled.

A. This judgment is a declaratory judgment which says that a claim, the claim against Universal, is owned by [157] Joe May—or it says, "Is hereby established that this claim is owned by Joe May," it is rendered in a lawsuit between the Bank for Foreign Commerce and the May Film A. G.,

(Testimony of E. O. F. Golm.)

which was represented by its liquidator. It creates law only between the two litigant parties, and nobody else is bound to this establishment. It is a declaratory judgment which has effect only between the two litigant parties.

Q. Does that judgment have any effect, under German law, as in any way affecting or concluding the rights, duties or obligations of the claim respecting that judgment?

A. No, it would not. And for my answer refer to the answer to the former question.

Q. Would that judgment in Germany have the effect of precluding or preventing Universal from contesting or challenging the fact of an assignment having been made?

Mr. Hirschfeld: We object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. It would never prevent Universal from doing so.

Q. (By Mr. Selvin): If I understand your opinion correctly, then, in so far as Universal is concerned, the question of whether or not there was an effective transfer of the claim from May Film to Joe May is in no way concluded or affected by that judgment?

A. This judgment concerns the relationship between the Bank for Foreign Commerce and the May Film A. G., and to that extent [158] it establishes

(Testimony of E. O. F. Golm.)

that the claim is owned by Joe May. That is the meaning of this judgment.

The Court: Let me ask you this question, in the light of what you have just stated: Assume that the Universal Corporation had paid the money to Joe May——

A. Yes.

The Court: ——could Joe May, upon the record of the judgment in the first case, enter a satisfaction of the judgment with the court upon presentation of a receipt from Joe May?

A. This judgment was rendered in favor of May Film A. G.

The Court: Yes.

A. So in order to pay this judgment it would have to be proved that after this judgment was rendered or before it was rendered a legal succession from May Film to Joe May was executed; otherwise there wouldn't be any satisfaction as to this judgment.

The Court: There is such a thing as what is called satisfaction of judgment of record in German law, is there not, either by execution or voluntary payment? Suppose execution is levied and payment is made. There is a notation that this is paid out?

A. There is a receipt and a party who made the payment is entitled to claim—now, I come back to my word “vollstreckungsklausell”. The party who made the payment has a right to claim—to be given

(Testimony of E. O. F. Golm.)

this judgment containing the [159] writ of execution, and without the writ of execution no execution would ever be possible again. This protects the party against an execution for the second time.

The Court: Without an entry of such a satisfaction in favor of the Universal Company, showing payment to the May Film Company, would the Universal Company be protected against a possible execution being levied in the name of the Aktiengesellschaft, by the attorney who represented them, in execution of any assets they may find in Germany?

A. Universal could have, as we call it, exceptio doli. It could say, "The May Film A. G. represented by its liquidator, tries to enforce an execution, a judgment, which in another trial, in which this same liquidator was a party, was considered, not to belong to the liquidator."

The Court: That is, the liquidator?

A. Yes.

The Court: In other words, they would be protected against the liquidator because of this judgment?

A. They would be protected against the liquidator because of this judgment, but not as far as the procedure is concerned. They have to institute a new trial asserting that the procedure is against bonos mores.

The Court: Yes.

Q. (By Mr. Selvin): But in the absence of such a procedure May Film could execute the judg-

(Testimony of E. O. F. Golm.)

ment, notwithstanding payment to Joe May? [160]

A. Oh, surely.

Q. Suppose, Dr. Golm, that as against Universal Joe May should claim that he is the owner of the judgment. Would Universal be precluded from denying that he is the owner, by virtue of the judgment between the Bank and May Film?

A. No. As I said before, this is a judgment between the Bank for Foreign Commerce and the May Film A. G., in liquidation, and only binding upon these two parties, and not protecting Universal against the claim of Joe May.

Q. Is there any difference in the law of Germany between what is called a guarantor and what is called a surety?

A. Well, the translation of our German word which defines a surety, which means a surety, is very often given as a guarantor; but in German law suretyship is a special type of a contract related to other types of contracts, through which a person may assume the responsibility to guarantee a certain obligation, a certain success. But a guaranty is not the same, always in German law, as a suretyship.

Q. What is the difference between the two?

A. The suretyship is exactly and precisely defined in Section 765, I believe, of the German Civil Code, and it says: "By the contract of suretyship, the surety obligates himself to the creditor of a third party to answer for the obligation of the

(Testimony of E. O. F. Golm.)

latter.” That means, in other words, that the suretyship is always an accessory to the obligation [161] of the principal debtor and that a surety promises to be liable for this obligation and that he could be made liable in case the principal debtor doesn’t pay. A guaranty means *garentie-versprechen*, or we should say the promise of a guarantee means that the person who guarantees, who undertakes the guaranty, wants to guarantee a certain success. A guaranty, for instance, might be taken for an argeement which later on is not to be found valid by the court. In this case the guaranty exists, nevertheless, but the suretyship would not exist. Because the obligation of the principal debtor is not valid the suretyship could not be valid, either. So we wouldn’t use the word “guaranty” for the German word “*burgschaft*”, which is suretyship.

Q. That is the German word for suretyship?

A. Yes.

Q. What is the German word for guaranty?

A. *Garentie* or *garentie-versprechen*.

Q. Is there any difference between those two forms of obligation with respect to the rights of the guarantor or the surety, as the case may be, to have transferred to him, by operation of law, the claim of the principal creditor against the debtor?

A. There are many differences. For instance, if the obligation of the principal creditor is not legally valid the guaranty exists, but not the suretyship. Another difference is what was quoted by

(Testimony of E. O. F. Golm.)

one of the counsel of the [162] plaintiff party the other day, Section 774 of the German Civil Code. This is a provision which applies for suretyship only, not for contract obligations, which have a certain relation or resemblance to a suretyship without being a suretyship; stated by the Supreme Court many times.

Q. Let us assume that A becomes the guarantor of an obligation which X owes to Y—becomes a guarantor, now, in the strict sense in which you have used it, and not a surety—and that when that obligation from X to Y becomes due that A, the guarantor, pays it. Does A, by virtue of the payment, succeed to any of the rights of Y against X?

A. I understand in that question that you don't want to use the word "guarantor" in translation of the German word "burge" in the same sense as surety?

Q. That is right.

A. Then this guarantor would not acquire it, because it is an independent obligation. This Section 774 is applicable to cases of surety only.

Q. And would the same answer be true with respect to any securities which the principal creditor held as to his claim?

A. If the claim is not transferred the security is not transferred either.

The Court: Is the conduct of surety made contemporaneous with the main contract of surety?

A. Not necessarily. [163]

(Testimony of E. O. F. Golm.)

The Court: Not necessarily?

A. Not necessarily. It can be made any time, before or later.

The Court: The contract of guarantor, then as I understand, the surety becomes liable primarily with the main obligor?

A. There are two types of surety. The surety can assume a suretyship, as a principal debtor; we call it "selbstschuldnerische burgschaft"; or the ordinary type of suretyship, which is liable only in the case that an execution against the principal debtor has been attempted, but without success, in certain cases where it isn't necessary to try an execution, where it is already known that the principal debtor is frustra excussus.

Q. (By Mr. Selvin): I am going to call your attention to page 5 of Plaintiff's Exhibit 10, which is the deposition of Erich Lenk, and call your attention to the answer to the question, "And will you tell us, please, what arrangements were made in regard to this particular loan for collateral in favor of your bank?" Will you read Mr. Lenk's answer, Dr. Golm?

A. I did not see this before.

Q. Will you read it now?

A. Yes. Mr. Lenk's answer?

Q. Mr. Lenk's answer. Have you read it to yourself? A. Mr. Lenk says— [164]

Q. Just a moment. Have you read it to yourself? A. Yes.

(Testimony of E. O. F. Golm.)

Q. From those facts, or from those purported facts which Mr. Lenk testifies to, is it possible to determine whether the relationship between Mandl and the Bank for Foreign Commerce was that of *burgschaft* or that of *garentie*?

A. It isn't clear, because he uses the English term "guaranty" and speaks about a personal guaranty of his wife, a stamp collection, and then he adds "unlimited guaranty of Mr. Fritz Mandl. And furthermore, the assignment of a claim." But it doesn't say anything as to which type of guaranty or suretyship it was.

The Court: Does that notice, in German, to Universal, which is part of Plaintiffs' Exhibit 5, throw any light on it?

Q. (By Mr. Selvin): You can read this and see if there is anything in there that indicates whether the relationship between Mandl and the Bank was *burgschaft* or *garentie-versprechen*. That is the letter which is part of Plaintiffs' Exhibit 5.

A. You mean here?

Q. Well, read the whole letter.

A. This letter has two parts. The first part is a quotation of a document made out by Mr. Joe May personally, and there he says that the claim is formally owned by May [165] Film, but essentially or materially owned by himself, and that he assigns this claim to the full extent and with all interest to the Bank. And then the Bank goes on and says, "As a further security for our claim we have, as

(Testimony of E. O. F. Golm.)

surety"—they use the German word *burgschaft*—"we have a suretyship undertaken by Mr. Fritz Mandl." Then they go on and say that since Mandl paid there was a transfer. This speaks about a suretyship of Fritz Mandl, but not about a suretyship assumed by Mr. May.

Q. Would the nature of the relationship between Mr. May and the Bank have any effect on the question of whether or not Mr. Mandl succeeded to the claim against Universal?

A. The question is this, as far as I understand: I have to assume the fact to be true that this claim against Universal, together with the assignment, was given as security or assigned or in some way transferred to the Bank by Mr. May?

Q. Yes, assume that.

A. So if Mr. May undertook a suretyship the question as to whether there was a transfer by virtue of law is to be answered in a different way than if he had not assumed a suretyship, but had some kind of a guaranty or some kind of an independent obligation toward the Bank.

Q. Is there anything in this letter, which is part of Plaintiffs' Exhibit 5, which indicates that Mr. May assumed one, rather than the other, form of obligation [166]

A. It only says that suretyship was assumed by Mr. Mandl. If this leads to the conclusion that suretyship was assumed by Mr. May, I don't dare say it.

(Testimony of E. O. F. Golm.)

Q. In other words, there is nothing in this letter to indicate what Mr. May's relation was——

A. No.

Q. ——because this letter from the Bank for Foreign Commerce to Universal, which is part of Plaintiffs' Exhibit 5—you have read that letter in its entirety?

A. Yes, I read it right now.

Q. Is that letter by itself effective, under German law, as a transfer or assignment of a claim to Mandl against Universal?

A. It isn't. This letter states certain facts, and then it comes to the conclusion that according to German law, in this special section mentioned here, that there was a transfer, by virtue of operation of law, to Mr. Mandl. Then it says, "Therefore, also, the claim assigned to us against Universal, amounting to Reichsmarks 50,000 and interest is 'übergegangen' ". That means "has gone over by operation of law." They don't say "assigned." It is "übergegangen" to Mr. Mandl. They give the juridical opinion about this action and then they come to the conclusion that after this Universal must pay to Mandl in order to be freed from the obligation which is concerned by the judgment. [167]

Q. Assuming that the facts recited in that letter are by themselves insufficient to effect a transfer, by operation of law, from the Bank to Mandl, would the letter be treated or considered, under German law, an assignment or transfer?

(Testimony of E. O. F. Golm.)

A. No, it isn't an assignment. It doesn't pretend to be an assignment. It only says there was an operation of law and, therefore, Mandl is now the legitimate creditor.

The Court: Is it a notice of assignment?

A. It is a notice not of assignment, but of a transfer by law, so that Universal would be protected. If, on the basis of this notice, Universal would pay to Mandl, Universal would be protected——

The Court: By the bank?

A. ——by the bank, but not by any other creditor who claims rights against Universal.

The Court: In other words, it is an admission against interest, that if the debtor paid out money he would be protected?

A. Yes. If the former creditor says, "I am no longer your creditor, but another person is your creditor and I want you to pay for this," then he could never later unclaim that. [168]

Q. (By Mr. Selvin): But payment and reliance on that letter would be protection for Universal only as against the Bank?

A. Against a new claim of the bank, since the bank itself gives notice that "We are no longer creditor but that Fritz Mandl is creditor." How could the bank come and claim it again?

Q. But it could not be protection against anyone else? A. Never.

(Testimony of E. O. F. Golm.)

Q. Suppose that upon receipt of this letter Mandl demanded payment of Universal. Would this letter in any way preclude or conclude Universal from contesting the fact that Mandl did not become the owner of the claim?

A. It would not, for this one reason alone: That the Bank says Mandl has become the creditor by operation of law. And if Universal wants to contest that operation of law and say, "The Bank made an erroneous statement. There wasn't any operation of law," this right is always reserved.

The Court: Let me ask one other question. If, in addition to the assignment of the claim, they also took other pledges or—— A. Securities?

The Court: Sort of securities——

A. Yes.

The Court: ——what is there in that letter to indicate that those securities had been valueless and that the entire claim was satisfied through the payment by Mandl? [169]

A. There is no indication as to the other securities and their value, and they don't say even what amount it is. They only say, "We have been satisfied by Mandl and, therefore, the claim"—which was a security; at least, economically speaking, a security. They also speak about an assignment, which is quite different from security. But security, for our purpose,—“has been transferred by operation of law to Mandl. They don't say any-

(Testimony of E. O. F. Golm.)

thing about the other security or whether they have attempted to seek satisfaction out of it.

The Court: Could anybody on behalf of May Film claim, in the face of this record, that Mandl did not, in fact, pay full value and that the Bank discounted the claim without authority and that they also sold the stamp collection and other things to satisfy their debt, so as to raise the question whether, as against them, Universal had the right to pay the full amount of the claim to Mandl?

A. Your Honor, in order to answer this question I have to say first, that assuming there is an operation of law, the claim of the creditor only can be transferred, and not the claim which was assigned to the creditor. The claim of the creditor, and only to the amount to which there is regress by the paying surety "burge", or whatever it is, against the person who is liable for it. But, for instance, if the bank had this claim, 50,000 marks—now, I just make an instance—and Mandl paid 25,000 marks—— [170]

The Court: Yes.

A. Then, if there was a transfer of law—by operation of law, it could have taken place only to the amount of 25,000 marks.

The Court: Pro tanto.

A. Yes. Because the law says, that in so far as a surety satisfies the creditor the demand of the creditor is transferred to him. So if a surety only pays a part of the remainder of the balance of a

(Testimony of E. O. F. Golm.)

debt, then only to this amount the claim of the creditor is transferred, and only to the amount to which the claim is transferred he could seek satisfaction out of any security, if there was a security. But here, I would never say there was one.

Q. (By Mr. Selvin): With respect to what passes to the paying surety, under those circumstances, is there any difference in the German law between a claim, let us say, which is given to the principal creditor by way of lien, and a claim which is absolutely assigned to the principal creditor, but as security for the debt?

A. There is a very decided difference, as laid down by [171] the Supreme Court in a decision in Volume 89, in Section 774 of the German Civil Code.

Mr. Hirschfeld: I would rather you not quote the German law, until there is some foundation laid for that particular case, to show the jurisdiction, to show whether it is applicable.

Mr. Selvin: I didn't know you had to show the jurisdiction of the Supreme Court to cite one of its opinions as a precedent.

The Court: No. He is merely citing an opinion of the court.

Mr. Hirschfeld: But shouldn't there be more than just an isolated opinion. We will object on the ground that it is incompetent, irrelevant and immaterial. It is interesting, I admit, but it isn't material.

(Testimony of E. O. F. Golm.)

The Court: Without in any way assuming that this opinion, which the witness is about to quote, is binding upon the lower court, it is nevertheless entitled to weight as coming from a German court in high standing, and in opinions which are published. This witness may give them to support his own opinion.

A. Your Honor, I didn't want to say that this opinion is binding in any way, but only to add that this opinion has great weight on others. [172]

Mr. Hirschfeld: Since your Honor will not entertain the objection that he may not use it, I wonder if we might have the book and page and year?

The Witness: Yes. May I just have it for a minute, in order to express my opinion, and then give it to him?

The Court: The volume here comes from our own library.

The Witness: It is an official collection of decisions of the German Supreme Court.

The Court: It is Volume 89 of the *Entscheidungen des Reichsgerichts*, New Series. You have the page?

The Witness: I think I had it, but I am not quite sure. I think it is 193.

Mr. Hirschfeld: And the year? [173]

The Court: 1917.

A. This is the decision. It starts on page 193, and the part which I was referring to is on page 195.

The Court: Give us the substance of it.

(Testimony of E. O. F. Golm.)

A. The substance is that Section 774, which deals with a transfer by virtue of law to a paying surety, is not applicable in cases where there was not a security, a lien mortgage or other type of security, but a real assignment. And the decision states—and I may add that that is my opinion. I agree with this decision.—It states that in such case where there is a real assignment given by any kind of a guarantor, surety or debtor, but not a lien or other type of security, there exists only an obligation of the creditor after his satisfaction to reassign this claim or to transfer it to anybody else; but that there is never operation of law taking place, as in case of Section 774 and 401 and 426, which is quoted in 774. So it states that there is only an obligation. To answer Mr. Selvin's question, I would say that in this case, where there was a real assignment of a claim given by Mr. Joe May to the Bank, and the Bank was completely satisfied, the Bank was under the obligation to free this claim and to reassign it either to Joe May or maybe to Fritz Mandl, if the facts are correct, but that there was no operation of law transferring this claim to Mr. Mandl. It is different from the security mentioned in Section 401 and other security and the re- [174] assignment.

Q. (By Mr. Selvin): Referring once more to Plaintiffs' Exhibit 5, that part of it which consists of the letter of February 12, 1936, you will find there on the first page quoted what purports to be

(Testimony of E. O. F. Golm.)

an assignment from Joe May to the Bank of the claim against Universal.

A. They use the word “abtretung.” The Latin word is “cessio”. That means an assignment, or in German, “abtretung.”

Q. What I mean, this letter quotes what the Bank says was such an assignment. Assuming that assignment was executed—and you understand it is my contention that that is no evidence of the fact that it was executed—but assuming that was executed, is or is not that a real assignment, as you have used that phrase in the answer last given?

A. Yes, surely, because he says, “I herewith assign the aforementioned claim based upon the judgment, to its full extent and with every interest or accessory claims, to the Bank for Foreign Commerce.”

The Court: Then, as I gather the substance of your statement relating to this, it is this: That Joe May, having made an actual assignment, as contradistinguished from any assignment by operation of law——

A. Yes.

The Court: Then, before Mandl could acquire any right there would have to be a direct assignment from the Bank to him, and not a mere operation by payment of the debt; is [175] that correct?

A. That is correct, your Honor. If May makes an assignment to the Bank there was no operation by virtue of law, but the Bank was under the obligation to assign this claim, after the Bank was

(Testimony of E. O. F. Golm.)

satisfied, to Mandl who paid, or to May. This depends on other reasons. But at any rate, this claim remained in the ownership of the Bank as long as it wasn't assigned by the Bank.

Q. (By Mr. Selvin): Assuming, Dr. Golm, that in some way there was a transfer, by operation of law, of the claim against Universal, from the Bank to Mandl by reason of the fact that Mandl paid the May Film indebtedness to the Bank. I think you have already testified that the transfer by operation of law would only be in so far as he paid, that is, his pro tanto transfer. A. That is right.

Q. Let us assume that the claim, which so passes by operation of law, is a claim which in turn was assigned to the Bank, by way of security, for the suretyship or *burgschaft* of Joe May of the same principal debt; that there was no agreement between Joe May and Mandl as to what their respective liability should be, as between themselves, in respect of their assurance of the principal debt. To what extent, if at all, would the security put up by Joe May pass, by operation of law, to Mandl? That is, assuming it did pass, to what extent would it pass? [176]

A. It would mean "mitburgen", co-sureties.

Q. Let's say co-sureties.

A. Co-sureties. The co-sureties are indebted in their relation to each other in equal parts. They are joint debtors. This follows from Section 774, paragraph 2, in connection with Section 426. In

(Testimony of E. O. F. Golm.)

other words, the relation between Mandl and May would be that Mandl would have acquired the right to claim contribution from May. They both would be liable to equal parts. That May had to pay half of the part which Mandl had paid, and to this part was liable to pay contribution to Mandl. So, as far as the security was given by Joe May to the Bank, and assuming the fact to be true that there was an operation of law through which this security passed, it would, so far as the relation between Mandl and May is concerned, only have the effect that now Mandl was entitled to claim contribution to the half from May, and to this extent seek satisfaction out of the security.

Q. Then, translating that, if we can, into actual figures, let us assume that the indebtedness of May Film to the Bank was 80,000 marks; let us assume that May Film paid 40,000 on that indebtedness and that Mandl paid the other 40,000. Let us assume that Joe May and Mandl were co-sureties in respect of May Film's obligation to the Bank. Then, upon Mandl's payment of 40,000 marks—well, there is one other assumption we have to make. That is, that [177] there was given to the Bank, by Joe May, as security, a claim against Universal in the principal sum of 50,000 marks?

A. Not by assignment?

Q. Not by assignment, but by way of lien.

A. Yes.

(Testimony of E. O. F. Golm.)

Q. We will assume that which is contrary to the evidence, but we will assume that upon Mandl's payment of 40,000 marks there was transferred to him the claim against Universal, which was put up by way of lien. To what extent would he be entitled to resort to that claim in satisfaction of the amount that he paid?

A. I have to assume that the debt was 80,000 marks and was paid to the amount of 40,000 marks?

Q. By Mandl. A. By Mandl.

Q. Yes.

A. Then only to this amount, at the utmost, could transfer of the creditor's claim be taken in consideration, because the claim didn't exist to a higher amount any longer. And as far as the relation between May and Mandl was concerned, Mandl would be entitled to claim contribution to the half of this amount from May. And to half of this amount the security would be a security for this claim of contribution. And on the question of the relation to the principal debtor—— [178]

Q. All right. Let us not get that far for the moment. Then, so far as his right to satisfy his claim against Joe May's security is concerned, it would be limited to the right of his contribution against Joe May? A. Against Joe May.

Q. That would be, on the assumed facts, 20,000 marks?

A. In so far as Mr. May is concerned.

(Testimony of E. O. F. Golm.)

Q. To what extent, then, could he enforce his claim against Universal, if it is by virtue of that fact?

A. By virtue of this fact, the relation between Mandl and Joe May wouldn't be the only decisive one, because there is also the principal debtor which has to be considered. And against the principal debtor the claim is still in existence, following this assumption, to the amount of 40,000 marks, and would be transferred to Mandl, to this amount, against the principal debtor.

Q. Then, assuming that the whole debt to the Bank was paid, part was paid by Mandl, the other was paid by May Film?

A. Then Mandl, in this case, would have paid 40,000 marks and would have acquired the claim of the principal creditor, to the amount of the 40,000 marks, against the principal debtor.

Q. May Film? A. May Film, yes.

Q. To what extent could he resort to the claim against [179] Universal?

A. There is a question that is doubtful. In this case the fact, which you ask me here to assume to be true, is that the security was put up by Joe May and not by the principal debtor.

Q. That is right.

A. There arises the question as to whether the security, which was put up not by the principal debtor, but by a third person, is also transferred

(Testimony of E. O. F. Golm.)

by operation of law. The question is contested in German law.

Q. Let us assume it is transferred by operation of law.

A. Then he would acquire the claim to the amount of 40,000 marks and, also, the security would be liable to this extent.

Q. If it passes by operation of law?

A. Yes.

Q. I understand that is a question——

A. ——which is contested. And the answer to this question depends upon the relation of the third person to the creditor, whether it was a real surety or whether he guaranteed his own obligation. For instance, if the third person says, “I am liable for this obligation, and as security for my obligation I give you this claim,” then there wouldn’t be the same legal consequence as in the other case.

Q. What would be the difference? [180]

A. As I said before, the suretyship is strictly an accessory, but there could be a guaranty or an independent obligation of the third person. And if the third person undertakes an independent obligation and gives a security this security can never pass to the paying suretyship.

Q. In other words, if Joe May put up the claim against Universal, as security for his own obligation, rather than May Film——

A. Which wasn’t a suretyship. In this case there wouldn’t be any transfer of the security, because it wasn’t given by the principal debtor.

(Testimony of E. O. F. Golm.)

Q. There wouldn't be any transfer by operation of law? A. No.

Q. Let us assume, with respect to the situation that we have been discussing generally, that at the time Mr. Mandl made payment to the Bank of the loan which it had made to May Film, and assume that that occurred prior to the annexation of Austria by Germany, or the merger consolidation of Austria and Germany, whichever it was, and at that time Mr. Mandl was an Austrian national and not a citizen of Germany, would there be any requirement, under the law of Germany at that time, that before anything passed to him, either by operation of law or otherwise, in respect to the claim against Universal, that a permit from the Foreign Exchange Control Office be obtained?

Mr. Hirschfeld: I object to that on the ground that it [181] assumes facts not in evidence. There is no proof that any such control office existed.

The Court: Well, that is the object of the question.

Mr. Hirschfeld: Or that any such control office was necessary. The question is, is it necessary to have a permit from the Control Office.

Mr. Selvin: I will withdraw the question.

Q. Assume that the payment by Mr. Mandl to the Bank for Foreign Commerce took place prior to the annexation or union of Austria with Germany; assume further that Mr. Mandl at the time of the payment and at all times prior thereto had

(Testimony of E. O. F. Golm.)

been and was an Austrian national and not a citizen of Germany; was there any requirement of the law of Germany at that time, which imposed the obligation as a condition to the validity of any transfer of the claim against Universal to Mr. Mandl, that a permit be obtained from any agency, bureau, department, division or functionary of the German government?

Mr. Hirschfeld: To which we object, unless it is stated whether the German law was a written law or unwritten law.

The Court: There wasn't any unwritten law in Germany; at least, not at that time.

Mr. Hirschfeld: There seems to be a lot, according to the witness. If there was such a statute or section I think we should have the benefit of it.

The Court: As an expert he will tell you whether there [182] is any section, that covers, it in operation at that time. What year are you talking about?

Mr. Selvin: I am talking of the time that Mr. Mandl made his payment which, according to the evidence, is 1935. That is, assuming there is any evidence of payment; according to the recitals in certain letters it was in 1935.

The Court: Objection overruled. You may answer.

A. I have to answer first that it isn't decisive whether he was a citizen of Austria or Germany, but whether he was a resident of Germany, because

(Testimony of E. O. F. Golm.)

the conception of the so-called *devisen-ienlander* and *devisen-auslander* does not necessarily apply to the citizens, but to the residents. But if he wasn't a resident of Germany then he was, in our law, a foreigner in the meaning of the provision dealing with this authorization to be given by a Foreign Control Exchange Office; and this authorization would be necessary, under this assumption, to any payment which Mandl wanted to make in Germany proper, either in German reichsmarks or in German currency. But it wouldn't have been necessary if, for instance, he forwarded money from abroad to Germany. If an American citizen, an American resident, had a debt in Germany he can always pay it by sending dollars over there. They are wanted.

A. But he can't pay this obligation from a bank account he has in Germany. [183]

Q. (By Mr. Selvin): Let us assume that at the time in question he was neither a citizen nor a resident of Germany, that the payment which he made was made out of a French franc account which he had with the Bank for Foreign Commerce in Berlin.

A. Doubtless he needed the authorization of the *Devisen stelle*. The English interpretation might be "Foreign Currency Exchange Control Office."

Q. Would any such permit be required in order that there be transferred to him, either by actual assignment or by operation of law, a claim held by either a German corporation or a German resident against Universal Pictures?

(Testimony of E. O. F. Golm.)

Mr. Hirschfeld: To which we object on the ground that the question fails to include the hypothetical point that he stated in his first question, to-wit, assuming that Mr. Mandl was neither a resident nor a citizen.

Q. (By Mr. Selvin): Make that assumption, too. Make the assumption that he was neither a citizen nor a resident of Germany.

A. Assume the fact that he was neither a resident nor a citizen of Germany, he needed the authorization for any payment from a bank account of French francs in order to make the payment valid. But assuming the fact that this authorization was given to him, then the legal consequence connected with the operation—I mean the consequence by [184] virtue of law something was transferred to him—then he did not need, in my opinion, an additional authorization.

Q. But suppose that, as a consequence of the payment, there wouldn't be a transfer to him of anything by operation of law, but an actual assignment was made.

A. There would be needed an authorization, because this was a transfer of a claim or a piece of property in Germany to a foreigner.

Q. What would be the effect on the validity of such a transfer of the absence or failure to obtain such authorization?

A. In the meaning of the civil law a transaction executed without a needed authorization is not valid. The criminal law has other—

(Testimony of E. O. F. Golm.)

Q. In other words, there are criminal consequences?

The Court: I am only interested in the civil.

Q. (By Mr. Selvin): What would be its effect upon the civil transaction?

A. It wouldn't be valid.

Q. (By Mr. Selvin): Dr. Golm, when a claim passes to a surety who pays the principal obligation, assuming that the transfer to the surety is by operation of law, is there any provision or any principle of German law relating to the [185] interest, on the claim which was transferred, that the surety may recover? A. Yes, there is.

Q. What is that?

A. If there is a transfer by virtue of law from the creditor to the paying surety, then the surety does not acquire the right to claim the same interest which the creditor would have been entitled to claim in case the principal debtor didn't pay, but the paying surety is only entitled to interest at the rate of the so-called legal rate; that means four per cent; and this only if and in so far as the debtor is im verzuge, in default. I merely refer again, in connection with this, to a decision of the Supreme Court of Germany printed in this official collection of the decisions of the Reichsgericht, in Volume 61, page 343. In this decision the question is——

Mr. Hirschfeld: Pardon me. May it be understood that the objection made to the reference and use of the former book applies here?

(Testimony of E. O. F. Golm.)

The Court: All right.

A. In this decision the Supreme Court expresses the opinion, which is my opinion, too, and which I was expressing before, that in a case where transfer of law is executed to the paying surety this surety can only ask for interest at the legal rate and under the legal conditions. That means, principally, if the debtor is in default of payment, either [186] by an announcement executed by the creditor or by a fixed date for the performance of his obligation.

Q. (By Mr. Selvin): That is four per cent per year, isn't it?

A. Four per cent per year. Volume 61, page 343.

Mr. Hirschfeld: And the year?

A. The year? It is published in 1906. It is a decision of 1905. [187]

United States
Circuit Court of Appeals

For the Ninth Circuit. 3

JOHN LUHRING and MARGARET MORRIS,
as joint tenants,

Appellants,

vs.

UNIVERSAL PICTURES COMPANY, INC.,
a corporation,

Appellee.

Transcript of Record

In Two Volumes

VOLUME II

Pages 367 to 570

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

OCT 21 1942

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Upon Appeal from the District Court of the United States
for the Southern District of California,

Central Division

MAX RADIN

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Max Radin.

Direct Examination

Q. (By Mr. Selvin): What is your profession?

A. Professor of Law, University of California, Berkeley.

Q. Have you ever resided in or visited Germany? A. Several times.

Q. Do you speak and read the German language?

A. I do.

Q. What has been your training and experience in the study of German law?

A. I have been teaching comparative law in Columbia and in the University of California since the year 1918. I have been a member of committees on comparative law. I have paid special attention to the German law in that connection. I am now conducting a seminary in German law. I have been an expert witness on the German law in a number of cases in the State courts of California and the federal courts since 1920. I have written articles on German law in the American leading periodicals and in one German paper.

Q. You are familiar, no doubt, with what in American law we call a judgment in rem? [192]

A. I am.

Q. Is there any equivalent or analogy to that in the German law?

(Testimony of Max Radin.)

A. There are judgments dealing with the status of the family, covered by Book 6 of the Code of Civil Procedure of Germany. There are cases involving family status, covered almost wholly in Book 6 of the German Civil Code of Procedure, which are judgments *in rem*. Although that term is not used in German law to any extent, in so far as the status determined cannot be attacked laterally once it has been determined by the court. There is nothing corresponding to the judgment *in rem* involving ownership or obligatory transactions.

Q. Are you familiar with the judgment which is part of Plaintiff's Exhibit 3 and which we have referred to here as the declaratory judgment between the Bank for Foreign Commerce and May Film?

A. I have read that judgment, the original and the translation.

Q. Using the term "judgment *in rem*" as we use it ordinarily in American law, would you say that is a judgment *in rem*?

A. If I may refresh my memory by looking at the last part?

The Court: Yes.

A. No, that is a declaratory judgment and, in my opinion, [193] is not a judgment *in rem*.

Q. In your opinion, under German law, would that judgment have binding or conclusive force upon anyone not a party or a successor in interest to a party to that action? A. No.

(Testimony of Max Radin.)

Q. What generally is the effect of German judgments, from the standpoint of the American law which we call *res judicata*?

A. They bind the persons who are parties and their privies. They bind no one who is not a party to the action.

Q. Is there, under German law, anything conclusive against one not a party to the action, or not a successor to the party to the action, as to the facts determined in that judgment?

A. No. I may say this, since I am speaking as an expert witness all this is qualified by the term, in my opinion.

Q. That is right. Are there, in the German law, any relationships analogous to what in the American law we call, on the one hand, guaranty, and on the other hand, suretyship?

A. Yes.

Q. What American term may be used to express those German relationships?

A. Either the term suretyship or guaranty represents the term "*burgschaft*" in German law. The German word "*garentie*" is sufficiently different to be sufficiently [194] distinguished in all doctrinal discussions or opinions of the court in relation to that.

Q. What, in a general way, is the difference under German law between the relationship called "*garentie*" and the relationship called "*burgschaft*"?

A. The "*garentie*" resembles more closely our

(Testimony of Max Radin.)

warranty. That is to say, it is a promise that a certain situation will exist, a certain particular thing will be made good. This promise is absolute, so far as the warranty is concerned. It may be an implied or express condition, but it is essentially different from the obligation of *burgschaft*. That is to say, the guaranty or suretyship, if I may take advantage of the suggestion of the court speaking from the American preface recently adopted of the German Civil Code, formerly were attempted to be distinguished. But even under the former distinction both would be within the German *burgschaft*, although the word "garentie" would be noticeably different in its effect.

Q. Is there any difference, under German law, between what in American law we call the rights of subrogation, as between the German garentie and the German surety or *burgschaft*?

A. There is.

Q. What is that?

A. That unless there is some express stipulation the man who makes the German garentie does not succeed, as a [195] matter of course, to the security. In other words, he is not subrogated unless there is some special contract or agreement that he should be so subrogated. Whereas, the German *burgschaft*, that is a guaranty or surety in California generally, is by operation of law subrogated to whatever security the creditor has.

Q. Let us assume, under German law, one of

(Testimony of Max Radin.)

the securities which the principal creditor holds is a claim or an obligatory right against a third party; that that claim was transferred to the Bank as security, but by an assignment absolute on its face. Would a claim of that sort pass, by operation of law, to a surety who paid the principal claim?

A. I think not; relying on the same case we mentioned before.

Mr. Hirschfeld: I object on the same grounds previously stated. It assumes facts not in evidence and counsel inadvertently mixed up a hypothetical question with an actual question, your Honor. [196]

Q. (By Mr. Selvin): All right, then; say the creditor, the principal creditor, in place of the word "bank"?

Mr. Hirschfeld: It is still objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. Basing my opinion on that same case in volume 89 of the Decisions of the German Supreme Court for civil cases and, further, discussions in the textbooks, the authorized annotated editions of the German Civil Code, I am of the opinion that it would not pass. If the assignment were such as to pass what we should call title to the claim to the creditor, in that case the title would exist and by operation of law the only thing that would pass would be a claim to have that title transferred to paying surety.

Mr. Hirschfeld: We ask that the part of the

/(Testimony of Max Radin.)

statement, "Basing my answer upon the decision in volume 89," be stricken on the ground that no foundation has been shown for volume 89, and it is cross examination of the witness.

The Witness: Then, may I say that instead of basing it upon that, in my opinion from my study of the case; and further, from a study of the matter in the annotated editions of the code I am confirmed in my opinion that it would not pass, unless by operation of law. [197]

Q. (By Mr. Selvin): Assuming, Prof. Radin, that the only two stockholders of a German corporation, an ordinary business corporation, enter into an agreement in terms such as is quoted here on page 181 of Plaintiff's Exhibit 3, and which I will ask you to read——

A. You mean these two pages?

Q. No; just the quotation that ends here.

A. I have read that. [198]

Cross Examination

Q. (By Mr. Hirschfeld): Doctor, you state that a judgment in rem, as we understand it in this country, is contained in Book 6 of the Code of Civil Procedure?

A. Such judgments exist there, yes.

Q. Pardon?

A. Such judgments do exist there.

Q. And they refer mainly to matters of paternity?

(Testimony of Max Radin.)

A. Status of family relationship, actions of divorce, paternity. Section 6, as I remember it.

Q. Not having had the pleasure of being one of your students, Doctor, I will ask you what is Book 6, and ask you if you happen to have it?

A. It is right here. Volume 6. This is principally between parents and children. [200]

Mr. Hirschfeld: If your Honor will pardon us, we will be a little bit slow in trying to change a little German back into English, and so on.

The Witness: There is no translation of that.

The Court: Under Section 1908 of our Code of Civil Procedure, which has existed practically without change since enactment of the code, or with slight modification, a judgment in rem may apply as to title to a thing, a will, administration, a condition, or relation to a person.

The Witness: Yes.

The Court: Your statement is that the German provision would apply merely to the relation of a person, and especially to the domestic status?

A. So I understand it.

The Court: Of course, the relation of persons would apply, also, as to marriage or divorce or paternity.

The Witness: Yes.

The Court: But other matters, like title to real estate or the existence or non-existence of a will and competency to make it, and so forth, which would be the subject of judgments in rem, and

(Testimony of Max Radin.)

therefore, binding on all persons as determined in a particular thing, do not have equivalents in Germany?

A. It would bind only the parties to the action or their privies.

The Court: All right. Go ahead. [201]

Q. (By Mr. Hirschfeld): Doctor, does the effect of a title to real property ever, by operation of law or otherwise, become a judgment in rem?

A. If you mean people's rights can be concluded, who are not parties to the action in German law, I would say no. If you mean whether it might be called a judgment in rem in the translations of German doctrine and discussion, I don't know.

Q. To be more specific, if a person in Germany claimed to be the owner of a piece of property and occupied it for many years, and his son and son's son occupied it for many years, and somebody came along and claimed that he was the owner of that piece of property, and a court decided that this claimant was wrong, that he had no interest in that piece of property, could someone who had claimed under this defeated claimant still come into court in a subsequent action and not be precluded by the former judgment?

A. Of course not.

Mr. Selvin: That doesn't make it a judgment in rem.

A. That is precluding the parties to the action and their privies.

(Testimony of Max Radin.)

The Court: That wouldn't be a judgment in rem, because he would be claiming under the other. All you have to do is look at our own judgments. Even our own don't go that far.

Mr. Hirschfeld: I want to get two extremes and then draw a line. [202]

The Court: All right.

Q. (By Mr. Hirschfeld): The law in Germany, under such a situation as I have just described, is similar to that in this country?

A. I think so.

Q. And those who claim under or because of a predecessor in interest are bound by a former judgment; is that correct?

A. That is my judgment.

Q. What is a liquidator in Germany? Is he comparable to what we might term in this country a trustee in bankruptcy?

A. Very much like a trustee in bankruptcy.

Q. And he employs an attorney to represent him?

A. He generally does.

Q. The same as trustees in bankruptcy here?

A. He generally does.

Q. He is not a receiver?

A. No. But the difference between the trustee and the receiver in Germany and in the German konkursverwaltung, the German bankruptcy, that distinction isn't so sharply made. They do have officers of the court who are like our receivers and trustees, but those persons have not attained the same definite status as they have in our system.

(Testimony of Max Radin.)

Q. But the main difference between a trustee and receiver might be said, in Germany, to be in this respect: [203] That a receiver here is somebody who is appointed by the court, or someone who occupies a permanent position in a bankruptcy court, such as a referee?

A. A referee, not a receiver.

Q. Yes. A. Appointed by a referee?

Q. Appointed by a referee or by a court?

A. Yes.

Q. The trustee, however, comparable to a liquidator, is appointed by whom in Germany? Who appoints the liquidator? How does he get his job?

A. Through a court.

Q. Through an appointment. And by whom is application usually made for appointment of a liquidator?

A. By the creditors, as with us. Sometimes by the debtor, whose property is being liquidated.

Q. And among the duties of the liquidator is the duty to protect the claim of creditors; is that not so? A. Undoubtedly.

Q. And he does represent the creditors, in so far as the protection of the assets that——

A. Well, I would hardly say he represents the creditors to the same extent as the trustee.

Q. Does he not represent the creditors, in so far as protecting the assets of the business he has taken over? A. To that extent, yes. [204]

Q. And under German law, assuming there was

(Testimony of Max Radin.)

an asset of a business, is it not a fact that jurisdiction rests in this liquidator to go after those assets rather than in any individual creditor?

A. I don't know what you mean by jurisdiction.

Q. Let us say the desire or the power or the right to go into court and to take necessary action to gather the assets. Isn't that something that is in the liquidator's power——

A. In the liquidator.

Q. ——rather than in an independent creditor?

A. An independent creditor ordinarily would not be heard, except by petition.

Q. And he would ordinarily be represented through a liquidator?

A. I am speaking of representation there. If the creditor feels he has rights he would appear in that particular proceeding and try to assert them, but he is not represented by the liquidator in the same sense in which the trustee represents our creditors. [205]

Q. (By Mr. Hirschfeld): The rights and duties of a liquidator are the same whether one succeeds another or whether one continues right on through; is that not so, Doctor?

A. It depends on the authorization of the court. The court may definitely impose duties on one liquidator. But normally that would be the case.

Q. Under what circumstances will a court appoint one [207] liquidator with a right and duty to determine the validity or claim of ownership of an asset, do you know?

(Testimony of Max Radin.)

A. I don't get that question.

Mr. Hirschfeld: I will rephrase it.

Q. Under what circumstances will a court appoint a liquidator with a special duty of determining the validity of several claims to an asset?

Mr. Selvin: I object to that on the ground that it is not proper cross examination; not within the scope of the direct.

The Court: Objection sustained. Let's limit the examination of Dr. Radin to the particular topic. You have your own experts. You are not bound by his testimony.

Q. (By Mr. Hirschfeld): Doctor Radin, is it not a fact that oral assignments are recognized in Germany? A. Yes.

Q. What is there, then, comparable to our statute of frauds, that requires that assignments, or certain assignments under certain circumstances, must be written?

A. We have no such statute that requires they must be written. Q. They can be oral?

A. Yes. Our statute doesn't affect that. In Germany there may be a valid assignment made orally. [208]

Q. In Germany is there not such a thing as an equitable assignment?

A. That I would answer no.

Q. To your knowledge have the courts of Germany ever declared that where an assignment should have been made, and it was apparent that

(Testimony of Max Radin.)

it was the intention of the parties to make an assignment, that the court will give credence to what seems to be the intent and desire of the parties and consider that the assignment was actually made?

A. To that I would say no. If you confine yourself to the first half and say the courts would give credence to the intent of the parties—obviously yes. That is, their intention to make a contract whereby an assignment should have been made, where an assignment has to be made in a special form, or where an assignment exists in a transfer of papers, which has a special state of significance besides the title they represent, and where the title has to be transferred in a special way an agreement is made to transfer the title in that special way, the court would take into account anything which shows the intent. But in my opinion the German law never treats that as done which should have been done, as in the English courts of equity. It merely says it should be done and allows the man to go ahead and try to get it done. [209]

Q. And the *Amtsgericht* is a court comparable to our Municipal Court, but with a rather limited jurisdiction up to about 500 marks; is that not so?

A. I have forgotten the exact limitation. There is a limited jurisdiction both in the nature of the things it may deal with and also the amount it may consider.

Q. It doesn't have jurisdiction, however, to 50,000 marks, does it?

^(Testimony of Max Radin.)

A. As far as my recollection, no.

Q. Then the Amtsgerecht would not be the court of record or court of jurisdiction to determine the ownership of a 50,000 mark claim, would it, Doctor?

A. To determine the ownership of the claim? No.

Q. And the Amtsgericht, purely as an executory arm of the government—of the courts—issue instructions to levy executions without determining the ownership thereof; is that not so; to issue writs, in other words?

A. The Amtsgerecht issues, as far as it is a court of execution, which is a curious kind of institution that we don't quite have—issues executions and attachments without itself having determined the validity of the judgment on which these executions and attachments are based.

Q. As a matter of fact, mere issuance of a writ of execution from the Amtsgericht, then, does not determine whether or not the party seeking the execution is entitled to execution; is that not so? [213]

A. No; that is not so. The person who gets an execution from the Amtsgericht is entitled to execution of that particular judgment. It does not preclude the determination of whether the claim, upon which the judgment was based, was valid. That is a matter for another court.

The Court: But the execution of the Amtsgericht must be based upon a valid judgment of a different court?

(Testimony of Max Radin.)

A. Of a different court. That judgment is in court. The person who has the right to enforce the judgment is *prima facie* the owner of the judgment.

The Court: Is that when the *Amtsgericht* issues the writ of execution? The conditions precedent, which has been complied with, is the existence of a valid judgment of another court.

A. Valid on its face?

The Court: On its face.

A. It doesn't go into that. The person who is the owner of that judgment may execute it.

Q. (By Mr. Hirschfeld): Where A is the named plaintiff in a case where he has received a judgment, and A has sold or transferred or otherwise conveyed his rights in that judgment to B, and B wishes to have the *Amtsgericht* issue its attachment, when B shows to the *Amtsgericht* his papers whereby he becomes the owner, the *Amtsgericht* without questioning those papers will issue its writ, will it not?

A. Not necessarily. The person claiming to be an [214] assignee of a judgment must, in proper form, get that judgment transferred to him. It may be done by showing the chain of title. It may be done by making a special motion or bringing special action of a sort to get that judgment turned over to him. The *Amtsgericht*, to be sure, may sometimes take for granted that all papers are in order and issue the judgment in the name of the assignee. If the *Amtsgericht* made any error there

(Testimony of Max Radin.)

that can be corrected, but some special thing must be done by the assignee to get the judgment transferred to him. The mere having the assignment, whether oral or written, whatever the case may be, would not in itself entitle him to execute the judgment which is in the name of some other judgment creditor. He must definitely become the judgment creditor of that judgment.

Q. However, he can become the owner of that judgment without going into the Amtsgericht and having the Amtsgericht do anything about it, if he does not want an execution?

A. It would be difficult to see what the owner of a judgment would own, in Germany, without the right to execute the judgment. It would mean merely, at most, the right to have this execution issued to him after having established his right to the judgment.

The Court: Suppose he had an assignment in his pocket. What good would it do him if there was no recognition of that [215] right in the court that rendered the judgment?

A. I can't say that it would do any good, except that it might pass to him the claim he has.

The Court: The promise.

A. The promise to apply that judgment to him.

The Court: That would not prevent the original judgment creditor from seeking, if he were dishonest, execution on the judgment which has not been officially assigned for the record of the court?

(Testimony of Max Radin.)

A. I think he would be acting *mala fides* there, of course, but he would have a valid execution and the sheriff, or the marshals who are doing the execution, would be protected by the writ of execution.

The Court: Yes.

Q. (By Mr. Hirschfeld): Doctor, is it not a fact that many judgments in Germany are paid without an execution, or some?

A. I am speaking as an expert on German law. I don't know what the experiences of Germans are.

Q. Is it possible, under German law, for a judgment to be satisfied where there has not been any execution of the writ of attachment issued?

A. It may be paid, and from that time on the judgment creditor who, if the judgment debtor pays the debt and doesn't in some way or other secure to himself the judgment, the receipt which would enable him [216] to bring a defense in case he is ever sued again, or defend himself in case his property is seized by the proper authorities—he may be acting very unwisely, but it is possible, in other words, that a man may be paid and still subject himself, through his inadvertence, to paying again. But if you ask how judgments are satisfied, that is definitely provided for in the Code of Civil Procedure, and is done by securing the legal papers which indicate that this particular execution may no longer exist. There are legal papers to that effect. I don't believe that there is any mark of a satisfaction put on the records as to the fact; that

(Testimony of Max Radin.)

is done by handing him documents which will protect him against another execution on that same judgment.

Q. Is there no such thing as satisfaction of judgment filed in the Landgericht or in the Kammergericht?

A. My own experience in actual German practice, of course, doesn't exist, because, naturally, as a foreigner in Germany I couldn't practice there. I only know the law as I see it in the books and discussions. I know of no such procedure as ours, in which satisfaction is put on the books, that from that time on no court could issue execution.

The Court: How would they indicate that a particular judgment is no longer subject to execution?

A. By handing this man this paper, of which some record is kept in the court. But it isn't in the same court. The Amtsgericht is the execution court. [217]

The Court: You say it isn't in the Amtsgericht?

A. It is in the Amtsgericht, the execution court.

The Court: But not in the other court?

A. I don't think so, but, as I say, I haven't gone into that.

The Court: That would have the same effect, wouldn't it?

A. That would have the same effect, because obviously, in Germany or in the United States people don't pay judgments twice if they can help it.

Q. (By Mr. Hirschfeld): The Amtsgericht,

(Testimony of Max Radin.)

however, is very limited in its geographical and territorial jurisdiction, is it not? A. Yes.

Q. There are very many Amtsgerichts in Germany?

A. Many Amtsgerichts in Germany.

Q. And is it not a fact that the Amtsgericht, to which you go to get an execution, is the Amtsgericht in charge of the district in which the defendant lives? A. That is the rule.

Q. Do you know how many Amtsgerichts there are in Berlin? A. A great many.

Q. You would not say, Doctor, that there is no way of satisfying a judgment in the Kammergericht— A. I wouldn't say that.

Q. —without going and bothering the Amtsgericht, [218] would you?

A. I wouldn't say that. I don't know.

Q. Doctor, you stated as your opinion, after you had read the Exhibit 3, page 181—

A. Exhibit 3. One moment.

Q. You recall a somewhat lengthy hypothetical question which started off, "Assuming that two stockholders of a business corporation make an agreement?"

A. Yes, I remember that question. I don't remember whether it is Exhibit 3 or not.

Q. Doctor, would your answer be the same if, at the time the agreement was made, there were no creditors and if, at the time other creditors came into being, they did so with knowledge of a consent to the agreement that was made?

(Testimony of Max Radin.)

A. I would like to get the question more clearly in mind. It was a long question. I hate to ask the reporter to read it over again, but I want to get the background of your conditions, if I may ask the reporter to read that.

The Court: Mr. Selvin's question?

A. Mr. Selvin's hypothetical question, which I answered, and which counsel wants me to answer again with two new conditions in it.

Q. (By Mr. Hirschfeld): If you will allow me, Doctor. I have made some notes. I will rephrase my question and I will try to include the entire question. Assuming two stockholders of a business corporation make an agreement [219] according to page 181 of Exhibit 3, and assuming that after the agreement is signed a judgment, according to Defendant's Exhibit C, is given, and assuming that a judgment or order, per Exhibit D, is given, and assume that among the assets of this business corporation was a claim for 50,000 marks. You stated that in your opinion, substantially, that the result of that document was that the person served was enjoined or the money in his possession was sequestered so that he could not pay.

A. I remember that.

Q. Would your answer be changed—I am sorry, I have the wrong answer. I guess you said that wasn't a valid assignment. Would your answer be changed in any way if there were added to this question two additional factors; first, that at the time the agreement was made the company was

(Testimony of Max Radin.)

solvent and had no creditors and, the second fact, that such creditors as later came into being did so with knowledge of this agreement and having consented thereto?

A. I can't answer that unless you tell me whether it includes something in my mind, namely, whether one of the creditors that came into being is the creditor that brought the action which is represented by D.

Q. Let us add that additional fact, that that creditor came into being after the assignment had been made, had knowledge of it and had consented thereto after the agreement had been made. [220]

A. If the creditor who attempts, by attachment, to sequester property in the hands of a particular person, the only question is whether that property is in his hands.

Q. I am sorry. I confused you, Doctor. I mean, would you still say that the assignment wasn't good?

Mr. Selvin: He never did answer that the assignment wasn't good.

A. I don't remember that. I am surprised at your saying that.

Mr. Hirschfeld: I am sorry. I tried to write it out as fast as the Doctor talked, and I guess I missed.

The Witness: I don't remember saying that.

Q. By Mr. Hirschfeld: Would you answer the question with respect to the assignment?

(Testimony of Max Radin.)

Mr. Selvin: I object to that as not a proper question. I didn't ask him whether the assignment was valid or invalid. That was the question I asked Dr. Golm.

The Court: He may answer.

A. I can only answer this: That unless there are some matters involving mala fides, so that it is contra bonos mores, against good morals for the man to make the claim, it seems to me all that is asked for, in German law, is that when the attachment, the garnishment, is served, is there property in the hands of the garnishee which is covered by that garnishment? In that case that property is sequestered. It may be that the garnishee is acting mala fides in making [221] the sequestration. That is a different question which I know nothing about. [222]

Redirect Examination

Q. By Mr. Selvin: It is true, is it not, Doctor Radin, that under German law a particular transfer of a claim may be valid and adjudicated to be valid as between the parties to the transfer, and still be invalid as to creditors of the transferor?

A. That is correct. [237]

Q. And when that is the situation as against creditors of the transferor, the particular claim is deemed to be the property of the transferor?

A. That is generally true as to fraud among creditors.

Q. When that is true an order of assignment

(Testimony of Max Radin.)

and attachment, issued at the instance of the creditor of the transferor, would attach the claim as the property of the transferor?

A. That is the general principle of German law.

Mr. Selvin: That is all.

Recross Examination

Q. By Mr. Blum: Your answer there assumes that the creditors were in existence at the time of the assignment between the parties?

A. No, it did not assume that. It assumes that they were creditors who, under the German law, had a right to challenge the assignment.

Q. Those are prior creditors?

A. Not necessarily.

Q. Would that apply to subsequent creditors with knowledge?

A. It might. It depends upon the circumstances.

The Court: Is that all.

Mr. Blum: That is all. [238]

E. O. F. GOLM

recalled as a witness in behalf of defendant, testified as follows: [240]

Cross Examination

Q. By Mr. Hirschfeld: Dr. Golm, it is permitted under German law, is it not, for a man to put up, as security for his guaranty or endorsement, personal property—movables?

(Testimony of E. O. F. Golm.)

A. Surely.

Q. Are you familiar with what we call, in this country, a collateral loan note?

A. Well, I am to a certain extent familiar with it, as far as the use of the banks is concerned, who always ask for collateral for a loan, for instance.

Q. You are not familiar with the form?

A. Well, I had a certain experience with one of the American banks, so I am familiar to a certain degree. I wouldn't say I am completely familiar with that matter.

Q. It is necessary in Germany for the owner of personal property, who wishes to guarantee and secure a debt with a pledge, to use a special form, or not?

A. You are speaking about corporeal things?

Q. Movables.

A. Movable things and tangible things given as a pledge?

Q. Yes.

A. In our law this would be done in this way: That the pledge itself is delivered to the bank. May I use the instance which appears in this case, a stamp collection? In order to be pledged it has to be delivered to the bank. [242]

Q. Is any letter or document or assignment needed?

A. In this case not, because it is a corporeal thing.

The Court: You are speaking of the stamp collection?

(Testimony of E. O. F. Golm.)

A. The stamp collection; not about the claim.

Q. By Mr. Hirschfeld: And the same thing applies to the furniture and jewelry, and to a play—a story?

A. A story? No.

Q. A story? A. No, I wouldn't say so.

Q. What is necessary with a story?

A. A story as itself is not valuable as a thing, a copy of a book or something. But the copyright is valuable. In this case the copyright has to be pledged. This requires another transaction.

Q. How is a copyright pledged?

A. The copyright pledge is in the same way as you would assign a copyright, with one difference; that is, you would say, "I don't assign it to its full extent, but I assign it"—"I transfer it," would be the better term, "to you as a pledge; as a lien or pledge."

Q. Must this be in writing?

A. Not necessarily. For instance, if you deliver a copy of this book and there is complete understanding about this, it could be also done without a written document.

Q. How is a judgment pledged?

A. A judgment, as such, can never be pledged, because a [243] judgment is a document which is the proof in which is vested a claim. The claim resulting from this judgment or confirmed by this judgment can be pledged.

Q. You said yesterday that if a claim is assigned the judgment follows the claim?

(Testimony of E. O. F. Golm.)

A. If a claim is assigned—are you speaking about the pledge, now, or about the assignment? It is quite different.

Q. I asked you how can we pledge a judgment. You said you cannot pledge a judgment.

A. You can pledge the claim.

Q. You can pledge the claim? A. Yes.

Q. When you pledge a claim on which there is a judgment how is this done?

A. This has to be done in this way: That I give a declaration stating, “I herewith pledge the claim, which is dealt with and which is fixed in this judgment, to you, as my creditor.” And since the judgment itself—I mean the piece of paper is a tangible thing it would be far more necessary that I deliver this corporeal thing to the creditor.

Q. What is the corporeal thing that you would deliver? A. The piece of paper.

Q. What piece of paper?

A. The judgment rendered by the court. But this is not a necessary—that is not the principal thing which is necessary in order to pledge a claim. As I said yesterday, [244] the judgment follows the claim.

Q. Yes.

A. If the claim is assigned to full extent and to full right then there is no doubt that the creditor has the right to claim the judgment, also, and there is no doubt, either, that in this case the creditor is entitled to a further step, which I wanted to point

(Testimony of E. O. F. Golm.)

out yesterday. He must have transferred in his name the so-called Vollstreckungsklausel. I avoided the English word "writ of execution", because it doesn't cover the Vollstreckungsklausel.

Q. I am interested in knowing not how many things we can do; I would like to find out the least that has to be done, the very least that we need to do to effect an eventual transfer. Therefore, if, in a hypothetical case, a corporation goes to a bank and asks the bank for an open credit—is this phrase familiar?

A. Yes, it is familiar to me.

Q. Please excuse me if I——

A. No. I would say it if I don't know the term.

Q. Thank you very much. ——and the corporation says to the bank, "We want an open credit of 90,000 marks." And suppose the bank says, "We are not satisfied to give you on your own promise that amount of money. You must give us some additional promise." And suppose that, in this hypothetical case, Mr. May says, "I personally will guarantee to the bank that if the corporation does not pay this debt [245] that I will pay." And the bank says, "This is not enough." And Mr. May says, "Then I will guarantee, my wife will guarantee, and together we will give you, as a pledge, first, a stamp collection; second, furniture; third, jewelry; fourth, a claim that I have against another company which has gone to a judgment. I will give you all this for this money." And the bank says,

(Testimony of E. O. F. Golm.)

“No, this is not enough.” And there comes to the bank a man by the name of—wait, we will stop there for a moment. Suppose here that the bank says, “All right; that is enough.” And Mr. May delivers to the bank, as is required under Germany law, the stamp collection, the jewelry, makes a paper for the furniture that is in the warehouse and gives the bank the right to take the furniture from the warehouse—in other words, constructive delivery.

A. Yes. That is the right term.

Q. —and the bank says, “Good. We are satisfied.” And in connection with the deal, upon this understanding, Mr. May also delivers to the bank an assignment of the claim which has gone to judgment.

A. Yes.

Q. All with the understanding and a part of this whole transaction. It being understood, partly in writing, partly orally, that if the May Film Company paid the bill that the bank will release Mr. May, will release Mrs. May, will give back to them their property and all will be well. [246] Under those circumstances, if the May Film failed to pay and the bank called upon Mr. May to pay, and Mrs. May, and they did pay the bank, would Mr. May and Mrs. May be entitled to receive back from the bank all of the securities and pledges and pawns automatically, under Section 774?

A. Now, the facts you gave me to be assumed have different parts. If I have to suppose to be true the latter part of your explanation, that after

(Testimony of E. O. F. Golm.)

an oral understanding was reached between the contracting parties then Mr. May, as you said, made out a written assignment to the bank and assigned this claim to the bank to its full extent, then my answer would be divided into two parts. First, the writ of assignment has the preference before any old negotiations and dealings before. For the interpretation of this legal transaction in the first place, the written assignment has to be examined, and if there is a contradiction, then might come up the question of how far we could go back to the negotiations before. If there is a written assignment of this claim, in consequence of the facts which you so kindly ask me to assume to be true, I am quite sure about my answer, and the answer is the same which I gave Mr. Selvin yesterday. There would be no transfer by operation of law, according to Section 774 of the German Civil Code, although on these facts which you give to me, and which are partly different from the facts given yesterday, there is no doubt that in this case there would [247] be a real suretyship assumed by Mr. May and Mrs. May in the meaning of Section 765 of the German Civil Code. This is the section which says, "If somebody promises to be liable for an obligation of another party he is a suretyship." The first section of the title "burgschaft"—suretyship. But when you ask me to assume that in consequence of all these negotiations Mandl assigns the claim to the bank——

(Testimony of E. O. F. Golm.)

Q. I didn't mean to confuse you by saying Mandl.

A. May. May. I made a mistake. I had in mind May, too. May assigns the claim to the bank. And may I ask, was this the assignment which was produced yesterday? Then there is no question that he never acquired the right by virtue of law, but there is also no question that he acquired the right to be released and to be reassigned with this claim which he had given as security. The method of facts upon which I base my opinion are given in one of the reports which I was quoting yesterday. At this time I have to make a little differentiation or addition. At this time Mr. Mandl did not come into the picture yet?

Q. That is right. A. Yes.

Q. You have continuously assumed that there was a direct, absolute, unconditional, unlimited assignment from Mr. May to the bank, in all your answers, have you not?

A. Unlimited, unconditional? I wouldn't say. An [248] assignment, in the meaning of the German law, as I was asked to assume——

Q. Well, your answers, then, have been based upon an assumption that the assignment to the German Bank was absolute, unconditional and unlimited? That is correct, as I understand you.

A. It could have certain conditions, but it must have been a real assignment. There can be no doubt about the conception of "assignment," I think.

(Testimony of E. O. F. Golm.)

It is just the same conception in the American law as in our law.

Q. I am sorry. I failed to make myself clear. I will try it this way: An assignment that simply says, "I assign this claim to you"——

A. Yes, that is better.

Q. That is a straight, absolute assignment; is that right? A. Yes.

Q. An assignment which says, "I assign this to you as security"—— A. As a pledge.

Q. "as a pledge," that is not absolute?

A. This is just what you asked me in the first place. This would mean, "I pledge this claim to you," in other words.

Q. I am trying to distinguish it in this way: The answer to my questions about the operation of Section 774 are based upon an assumption that the assignment of the [249] claim to the bank by Mr. May was in this first form, "I assign the claim to you"; and no more?

A. There could be more.

Q. But if the assignment was, "I assign the claim to you as a pledge," then your answer would be different as to Section 774, would it not?

A. In this case my answer would be different, but the document shown to me didn't contain these words. It was just the opposite.

The Court: Let us use the word that applies to both. Let us use "hypothecate".

(Testimony of E. O. F. Golm.)

The Witness: Hypothek is only applicable to real estate.

The Court: That is right, but we can use the word "hypothecate" in the same sense.

The Witness: Yes, in the meaning of pledging it.

The Court: Yes. There were no conditions of hypothecation in the document that you were shown?

A. No; just the opposite.

The Court: Just the opposite? A. Yes.

The Court: They state that it was an assignment?

A. I don't have it before my eyes, but I am speaking from my memory. It says, after certain facts have been mentioned, "I hereby assign this claim to its full extent, with all accessory rights and with all interest, to the Bank for Foreign Commerce." That was what I was asked and, of [250] course, if you give me other facts, then my answer must be different.

Q. By Mr. Hirschfeld: Doctor, as a witness, of course, you are not testifying as to actual facts?

A. No.

Q. We are asking you hypothetical questions.

A. Yes.

Q. So that when Mr. Selvin asks you one hypothetical question on which happens to be his side of the case, you may answer that. When I ask you one—I am permitted, I believe, to ask you other hypothetical questions, and you do not have to refer back to additional facts. A. No.

(Testimony of E. O. F. Golm.)

Q. Then you may show me what are the words?

A. You want to see the English or the German?

Q. Either one; the English preferably.

Mr. Selvin: Let the record show that the witness has Plaintiffs' Exhibit 5 before him.

A. "With these premises I hereby transfer and assign to the Bank fuer Auswaertigen Handel Aktiengesellschaft Berlin S. W. Marksgrafenstrasse 41 the above mentioned claim and judgment together with interest and all other rights to its fullest extent." So if I am asked what this is I could only say, as an expert on German law, that there can be no doubt that this is a full assignment.

The Court: What you are reading, Doctor, is the purported [251] assignment contained in that letter of February 12? A. Yes, the quotation.

The Court: The letter of February 12, 1936, sent to Universal Pictures Corporation by the Bank?

A. That is right.

The Court: Part of Exhibit 5?

A. That is right. That is the German text. And the German text, if there is a difference, it is even clearer than the English.

Q. By Mr. Hirschfeld: Referring to the English,—and if it isn't a good English translation please correct it for me, because I am relying upon the English translation, as I do not have the knowledge of German that the court and others here have—I call your attention again to where it says, "I assign the above mentioned claim and judgment,

(Testimony of E. O. F. Golm.)

together with interest and all other rights to its fullest extent." Does this not mean that I assign the claim and judgment and the interest and all of the rights to execution and do whatever you need to do when you have a judgment; complete?

A. It is a complete assignment.

Q. I mean, does it not mean that I am assigning a judgment with all of its rights complete?

A. Yes, but you asked me whether he was entitled to have it back, and this follows from the first part of it. [252]

Q. If we assign a judgment, together with all of its rights and privileges to be exercised to its fullest extent, does this not possibly mean, as you read it over, that I do not assign the judgment away absolutely and deprive myself of it, but I am assigning the judgment with all of its privileges so that you may execute on it? Could not that be the interpretation here?

A. Shall I interpret this from this paragraph or from another hypothetical case?

Q. From this paragraph.

A. From this paragraph, I would answer no, because he says, "With these premises I herewith assign."

Q. That is the question, then. He assigns it subject to some premises?

A. He wants to call attention to the premises.

Q. And in the statement of the assignment he refers here to 12 lines or so, above it, reciting the

(Testimony of E. O. F. Golm.)

premises. Now, it says, "Under date of February 9, 1933, the following assignment was given our Bank as security." I am referring to the Bank's letter, now. A. Yes. [253]

Q. What I would like to call your attention to first is this: In the letter, before they quote the assignment, the Bank states, "Under date of February 9th, 1933, the following assignment was given our Bank as security for our claims against May Film A.-G. in liquidation, Berlin." Does this not convince you and show to you that the claim was not assigned absolute, but was assigned as security?

A. It convinced me that it was assigned absolutely as security. We have this assignment as security. But it wasn't a pledge. It is just the opposite of a pledge.

Q. You are going to make a distinction between the assignment of a claim as security and the assignment of a claim as a pledge? That is the difference?

A. That is the real point.

Q. I would like to go on just a little further with our hypothetical question. Now, keeping in mind what I have said before about Mr. May going to the bank and arranging a loan, he and his wife put up certain security as a pledge, and [254] suppose the Bank says, "I am not yet satisfied that the corporation is good or that you, Mr. May, are good, or that Mrs. May is good, or that your jewelry, your furniture or stamps will be good enough secur-

(Testimony of E. O. F. Golm.)

ity. I want something more." Suppose, then, Mr. Mandl goes to the Bank and says, "I want you to make this open credit to the corporation", and the Bank says, "Will you guarantee it?" He says, "No"——

A. Mr. Mandl says, "No"?

Q. Yes. —— "I will not guarantee to you that the May Film Corporation will pay the bill, but I guarantee that if Joe May, who has promised to pay the bill, does not pay it that then I will." [255]

The Court: We are going into a lot of supposition as to what did occur and what didn't occur. The fact remains that the basis of that entire thing is the letter or notice. In it is a purported assignment. The main question before the court is what, if anything, is the effect of that; not what happened. You cannot bind Universal by anything that occurred between Mr. May and the Bank, when the basis of their claim is what they themselves have delineated in this notice. You couldn't put Mr. May on the stand now and prove an understanding that this was to be for hypothecation only, and destroy the effect of the notice, the so-called assignment upon which the claim passed. It is entirely contained in its notice to Universal. You can't go beyond that notice. You have to interpret that notice in the light of what it says. It isn't ambiguous. It says specifically, "This is the basis of our claim." Evidently it was prepared by their counsel. They give the section of the Code of Civil Procedure,

(Testimony of E. O. F. Golm.)

under which certain occurrences are given certain effect. So it can't be speculated as to what might have occurred there, or you can't produce Mr. May to testify what happened. Mr. May could not intrude, because the rules of evidence would be contrary to it. To permit the introduction of what actually took place, what the transaction was, would [256] be to destroy the effect of this instrument, which is the only basis of the claim against Universal, so far as the ownership of the claim is concerned. So I will sustain the objection to the question on the ground that it assumes facts not in evidence. It is an attempt to modify the terms of the notice which sets forth the basis of the Bank's contention that Mandl was subrogated to the claim against May Film. Now, you may go on to something else. [257]

Q. When you had Exhibit 5 in your hand yesterday did you not say that, for the purpose of determining suretyship as you were discussing it at the time, it was quite clear what Mr. Mandl had done, but that it wasn't quite clear and conclusive what Mr. May had done?

A. I cannot recall that I have made the statement, examining this document this morning, that it is completely clear to me what Mr. Mandl—you don't mean Mr. May?—what Mr. Mandl had done, but not clear what Mr. May had done.

The Court: The question is, did you make such a statement yesterday? A. I can't recall it.

(Testimony of E. O. F. Golm.)

The Court: Then, that answers it.

Q. By Mr. Hirschfeld: Will you tell me what you did say?

A. Examining this document, and from my recollection, I said it appears to me to be completely clear that Mr. May made an assignment, to its full extent of all interest and all rights, to the Bank, with certain premises. These premises indicate that this assignment was meant for the purpose of security, but was a real assignment. And as far as I recall, [260] furthermore, in this connection I referred to a decision of our Supreme Court which is applicable to this case, in my opinion.

Mr. Selvin: I don't want to suggest to put anything in anybody's mouth, but I think I know the answer which Mr. Hirschfeld has in mind.

Mr. Hirschfeld: Will you tell it to me, with your Honor's permission?

The Court: Yes.

Mr. Selvin: In an entirely different connection, when I was examining the witness as to the difference between garentie-versprechen and burgschaft, the court and I asked the witness if, in Mr. Lenk's testimony in his deposition, there was any indication as to what the relationship between the parties was. Dr. Golm said, no. The court asked him if there was any indication in this letter as to what the relationship was, and Dr. Golm said that the term "burgschaft" was used in connection with

'(Testimony of E. O. F. Golm.)

Mandl's relationship, but there was nothing to indicate what May's relationship was.

The Court: That was it.

The Witness: That's it.

Q. By Mr. Hirschfeld: Doctor, is it not a fact that under German law you cannot assign a claim and a judgment as security without making an absolute assignment?

A. Yes, you can. You cannot assign it as security [261] without making an assignment; is that your question?

Q. Yes.

A. Of course, you cannot assign it without making an assignment.

Q. In absolute form?

A. The conception "assign" indicates that you have to make an assignment. But if you want to ask me whether you can pledge it without making an assignment; no, they will want a pledge.

Mr. Hirschfeld: Your Honor, I want to straighten out a word that is translated as "lodgment". I have the law on that. I want to bring it out. I think there is a distinction.

Q. The assignment in its form must be absolute, is that not so, even though it is understood that it is as security?

A. The assignment in its form must be absolute, even if it is understood that it must be security; but security is not to be replaced by pledge.

(Testimony of E. O. F. Golm.)

Q. Now, you cannot pledge a claim without assigning it, can you?

A. I can pledge a claim in making out an assignment, or better to say "transfer as a pledge".

Q. You do have to transfer the claim, do you?

A. As a pledge, with an addition. I mean, you have to make an addition to an absolute assignment. If you want to express that, you don't assign it as a usual assignment, but [262] as a pledge.

The Court: Let me see if I get it. In other words, the main idea is this: In order to transfer ownership in a claim you have to assign it and you use the words, "transfer the claim"; is that right?

A. Yes.

The Court: Then, if your assignment is for security you would add to the words of assignment words indicating that it is for security. Is that what you mean?

A. That is not necessary, your Honor.

The Court: It is not necessary?

A. That is not what I mean. I mean the form of giving a pledge, or security with a claim, is the same form which is applicable to an assignment. But there is a difference. If I use the word "assignment", which means in Germany "abtretung"—

The Court: Yes.

A. Then it follows the rule given for assignments, in Section 398 and following, of our German Civil Code.

The Court: Yes.

(Testimony of E. O. F. Golm.)

A. This is a real assignment, which doesn't exclude that this real assignment is to be a security, to constitute a security, and which would lead to the consequence that after this purpose has been fulfilled to the creditor he has to reassign to me. But if I don't want to give an assignment to the full extent, but only so that the creditor [263] acquires a lien, a pledge on this claim, then I have to make this clear, in addition to my other declaration, to say, "I herewith transfer or assign"—maybe this could be also used—"assign the claim as a pledge." A security is also some kind of a fiduciary relationship between the creditor, and in virtue of this fiduciary relationship the creditor acquires the claim given to him, to its full extent, and can execute all the rights, flowing out of this claim, against everybody, with the only restriction that in the interrelation to him——

The Court: He must act in good faith?

A. ——he must act in good faith and has to reassign after the purpose is fulfilled.

The Court: Yes.

Q. By Mr. Hirschfeld: Now, Doctor Golm, if an assignment is made with words of transfer, and both parties know and understand that it is as a pledge, it will still be a pledge without that particular word being in it, will not not? It does not all have to be in writing?

A. I would say it is what we call "Sicherungsabtretung", an assignment as security, but which is

(Testimony of E. O. F. Golm.)

an assignment and not a pledge. The difference, if I may explain this: That for the outside world, for every third person the creditor, who acquires a claim for security by assignment, is the legitimate holder of the claim. While a creditor who acquires a claim, as a pledge only, is [264] restricted in his rights, and there is always the owner of the claim who comes into the picture with it.

Q. Suppose the principal debtor defaults in an instance where he has pledged a claim; for instance, May defaults and has pledged the claim to the Bank. Can the Bank execute and operate on that assigned pledge?

A. Well, now, he assigns it as a pledge?

Q. Yes. Can the Bank act on it immediately?

A. The Bank can act, but there is a certain procedure that the Bank has to comply with.

Q. In other words, it has been transferred to the Bank?

A. As a pledge. It is a hypothetical question. Shall I answer the question, has it been assigned to the Bank or transferred as a pledge? Then, I would say on this document, it has been assigned. But this doesn't exclude that another transaction can't be made as a pledge.

The Court: In other words, the existence of it doesn't exclude any collateral agreements which are not set forth?

A. Oh, yes. I would say this document excludes collateral agreements, in so far as we have the rule

(Testimony of E. O. F. Golm.)

that if there is a written agreement this is the crux of the matter and decisive. And the one who wants to claim that another transaction has been made has to state and to make clear why this other transaction was not incorporated into the document.

The Court: We have the same rule. Ultimately, I think [265] the general fundamental principles underlying human relations are the same. We always assume that everything is in a written contract.

Q. By Mr. Hirschfeld: Doctor, what is the difference in procedure and in results, if any, between an assignment made as a pledge and a straight assignment where there has been a default?

A. Well, the difference in the procedure is not very strict. You mean in order to seek satisfaction out of the claim? The differences are not very strict. There are certain differences. If you want me to I can give you the code which deals with——

The Court: You might state in a general way.

A. In a general way, in cases where there is only a pledge concerning a claim the creditor, by pledge, cannot act completely independent of the owner of the pledge, who is still entitled to the claim to a certain degree.

The Court: And the other assumes a straight assignment.

A. He is completely free to do——

The Court: Just as the holder would be obligated only to account to the owner?

(Testimony of E. O. F. Golm.)

A. That is right. He has certain obligations against the owner.

Q. By Mr. Hirschfeld: Do you mean, then, that if a [266] claim has been assigned as security, without the word “pledge”, that the provisions of Section 774 do not apply at all?

A. Now, I have to proceed upon the assumption the document reads, “I herewith assign this claim as security,” shall I not?

A. “I herewith assign this claim as security.”

Q. By Mr. Hirschfeld: Yes.

A. This would be—I have to translate it. A literal translation would be “sicherungs abtretung”—abtretung is assign; sicherungs is security—which is not in the legal structure, but in effect similar to a pledge, but has different effects. And even though I assume that the words, “I assign as security,” would be added to this document, it would still remain a sicherungs abtretung, which means that the Bank acquired the claim to its full extent and its full right but with the understanding that it was a security and had to be given back after the purpose of the security was no longer in question.

The Court: Would you follow it up by saying how far the security would apply?

A. In this case Section 774 would not apply, because this section applies not to cases where a creditor is under the obligation only to give back the security. It applies only in cases where there is a transfer by virtue of law. And it [267] wasn't

(Testimony of E. O. F. Golm.)

possible in a case like this. The decision which I showed you yesterday in Volume 89. [268]

Q. By Mr. Hirschfeld: Is there any doubt in your mind that the assignment from Mandl here would be constructed by the courts of Germany as an assignment for security?

A. This assignment?

Q. The very one you have in front of you—from May, I mean.

A. Without the letter of the Bank this document is an assignment for the purpose of security. It doesn't mention the purpose of security, but it has to be interpreted as an assignment for the purpose of security; but since it is a full assignment the Bank is the full creditor.

Q. But it is claimed, is it not, from reading this letter, that the assignment was for security?

The Witness: I answered this more than once, and I can't retract from my statement. I think my opinion is truly clear.

The Court: Then we will let the answer remain.

Q. By Mr. Hirschfeld: Is it not a fact, Doctor, that with respect to a claim that has been reduced to a judgment [269] you cannot sell it outright?

A. Pardon me. I didn't get the question.

Q. Is it not a fact that where you have a claim that has become also a judgment, that you cannot sell it outright from one to another?

(Testimony of E. O. F. Golm.)

A. The German word for sell is "verkaufen". I mean, I can sell a book. And I can sell a claim, but through the transaction of selling only, the ownership is not transferred. In order to transfer the ownership of a thing I have to deliver it; and in order to transfer the ownership of a claim I have to assign it.

The Court: Can't you sell a right? We have a phrase, which is mongrel French and English, which we call "choses in action".

A. Oh, yes.

The Court: Is there such a thing as a transfer of a chose in action, a right to pursue a remedy, a right to sue somebody in a civil court for a claim?

A. Yes. I can sell any right whatsoever. The only thing is that we have a very precise distinction between the so-called "schuldverhaltnis"—the obligation created by a transaction, which we call "schuldverhaltnis", and the accomplishment of the obligation through assigning the right and transferring the right.

The Court: Yes. In other words, the sale, as we would call it, is the motivation; the agreement which results in [270] the transfer and precedes it?

A. That is correct, your Honor. I could, for instance, make out a contract and say, "I am willing to sell this to you." And the other person may accept it. Then I have to fill this contract and deliver.

(Testimony of E. O. F. Golm.)

The Court: Yes.

Q. By Mr. Hirschfeld: Now, Doctor, with respect to the method of transferring the claim where you have sold it, would you not also use the word "abtretung"?

A. If I sold the claim? Of course, as I said before, in order to accomplish my obligation arising out of this sale I have to assign it—abtretung.

Q. Yes. And if you transfer a claim to a trustee—is that word familiar to you, Doctor?

A. Yes.

Q. If you transfer a claim to a trustee the trustee could do certain things?

A. Yes. Fiduciary.

Q. Fiduciary. You also use "abtretung" in the case of a fiduciary, in the transfer of a claim and judgment; is that not so?

A. That can be so and will be so in many cases.

Q. I don't mean that is the best way, but it can be done? A. It can be done, yes.

Q. Yes. And to transfer a claim as a pledge you have [271] to make words of "abtretung"?

A. No. To transfer a claim as a pledge I wouldn't use "abtretung". I would use the word "verpfaendung".

Q. But you can use the word "abtretung"?

A. No. If I use the word "abtretung" it isn't a pledge.

Q. But you can use the word "abtretung" with an addition?

(Testimony of E. O. F. Golm.)

A. If I make it clear to the world that it isn't an assignment, but a pledge.

Q. Yes.

A. I wouldn't use the term, but I would use a term that is understandable.

Q. Doctor, will you please refer to the German Civil Code and tell me if Section 239 defines a surety? A. 239?

Q. Yes. I have a book which you have already warned me, Doctor, is not a perfect translation.

Mr. Selvin: Do you have the translation by the Chinese? A. 239 doesn't—

Q. By Mr. Hirschfeld: Pardon me; 232.

A. 232 does not give a definition of what is a surety. It uses the term "surety", which is defined in Section 765.

Q. Well, 232 relates to the giving of a security, does it not?

A. Section 232 is, if somebody is under the obligation to give security, how can he fulfill this obligation. And Section 239— [272]

Mr. Selvin: 232.

A. 232 indicates different ways of doing so. For instance, first he may make a deposition of money or security—it means stock or something like that.

Q. By Mr. Hirschfeld: Pardon me, Doctor. I don't want to get too far away. Will you tell me first if the beginning of the section is correctly

(Testimony of E. O. F. Golm.)

translated as follows: "If a person has to give security he may do so"—then the way. Is that about right?

A. I would literally translate it, "A person who is under the obligation to give security can do so in the following manner."

Q. Does he have to be under the obligation?

A. Yes.

Q. Or can it be a voluntary giving?

A. No. Under this section he has to be under the obligation, because it says, "wer sicherheit zu leisten hat"—"one who has to give security."

Q. But cannot this obligation arise out of his agreement? A. Surely.

Q. That is what I mean.

A. It must not necessarily be an obligation created by law.

Q. By admission? A. By admission.

Q. He can lodge money or negotiable instruments. That [273] is the word in the translation I have. Will you tell me a better word if you have one? Is the word "lodge"—

A. This translation, which I didn't see before, just follows the words which I used: "One who has to give security may do so:—

by depositing money or papers of value,

by pledge of claims, which are entered in the Book of Debts of the Empire or in the State-Book of Debts of a Federal State,

by pledge of movable things,

(Testimony of E. O. F. Golm.)

by executing mortgages on land within the realm,
by pledge of claims secured by mortgage on land
within the realm or by pledge of liens on land
or of ground rents within the realm.

If security cannot be given in the manner indicated, an undertaking by a sufficient surety is admissible.”

Q. Yes. [274]

A. This doesn't define the conception of what a surety is.

Q. By Mr. Hirschfeld: Is the claim of the judgment against Universal a commercial transaction?

A. No. Do you mean—may I ask what transaction you have in mind?

Q. Well, is the judgment itself a commercial transaction?

A. The judgment itself is a document.

Q. All right. The claim upon which the judgment is based, is that a commercial transaction?

[275]

Q. By Mr. Hirschfeld: Mandl is entitled to only four [276] per cent. Is that what you said?

A. No. What I testified to is this: Assuming the fact to be true, that by virtue of law—I was asked this question: There was a transfer of this claim and this judgment from the Bank for Foreign Commerce to Mandl; assuming this fact to be true, to what interest would Mandl be entitled.

(Testimony of E. O. F. Golm.)

Q. Entitled to receive from whom, from Universal?

A. From the person which he is suing in order to seek satisfaction out of this claim. The debtor of this claim.

Q. That is Universal?

A. Universal, in this case.

Q. In the hypothetical case?

A. Yes. And I answered the question that, first, a transfer of law, if it is possible, which I have to assume in this case, could only be made to this extent: If he satisfies the creditor, the Bank for Foreign Commerce, only in so far as the claim of the Bank for Foreign Commerce could be transferred to him, that he is not entitled to the same interest which the Bank for Foreign Commerce would have been entitled to demand, but that he is only entitled to the legal interest if there is no expression to the agreement between the debtor and the other party. I base this opinion, which is my juridicial opinion, also on the decision of our highest court, printed in Volume 61, where this case is decided. [277]

Q. But in this case, Doctor, have you read the judgment? A. I have it here.

Q. No. The judgment in the case against Universal. A. Yes.

Q. And you have read the judgment rendered in the—— A. I translated it.

(Testimony of E. O. F. Golm.)

Q. —in the Reichsgericht. Did you observe that in that judgment the interest was specified at two per cent above the Reichsbank discount rate? A. Yes, I observed it.

Q. By Mr. Hirschfeld: In the event this court were to require the defendant here to pay to the plaintiff here that judgment, do you agree that the interest that should be charged is the interest that is shown in the judgment?

A. In the event that this court should agree that Universal has to pay this judgment—that is quite another question, which I am asked now. In the event, for instance, that this court for any reason should agree that Universal has to pay this judgment—

The Court: What would be the interest they are entitled to?

A. Then the interest at the rate set forth in the judgment. But that is another question. [278]

The Court: I know. That is the question he is trying to find out.

Q. By Mr. Hirschfeld: In any event, Doctor, is not the transaction between the Bank and Mandl a commercial transaction?

A. Which transaction between the Bank and Mandl?

Q. The one you have read about in Exhibit 5.

A. This notice only says that Mandl undertakes a suretyship in this case. In this case the word “burgschaft”, which means suretyship, is chosen.

(Testimony of E. O. F. Golm.)

The Court: Assuming that that claim sets forth, further, an obligation of Mandl, also; Is it a commercial transaction?

A. It doesn't appear from this, because it doesn't appear that Mandl undertook the suretyship, because it belonged to a mercantile trade.

The Court: Is it for an accommodation?

A. He says he was related to Mr. May and had business. This could be a private affair. But I don't know what Mr. Mandl did. A commercial transaction can only take place in the frame of a certain business, if the person is a mercantile trader.

The Court: In other words, going security for someone else at a bank, where there is nothing to show that it was connected at all with the business of Mr. Mandl, who was the surety, would not constitute a commercial transaction?

A. No. We must know more facts about it.

[279]

The Court: All right.

Q. By Mr. Hirschfeld: The fact that it was a business transaction with the Bank would not entitle it to be a commercial transaction?

A. Would not suffice to arrive at that conclusion.

Q. If the court construed the transaction to be a commercial transaction, then the interest rate would be as set forth in Sections 352 and 353 of the Commercial Code; is that not so?

(Testimony of E. O. F. Golm.)

Mr. Selvin: You mean if it is construed as a commercial transaction under the German law?

Mr. Hirschfeld: Yes.

A. The interest which Mandl could claim from Universal?

Q. By Mr. Hirschfeld: No. You testified yesterday that Mandl's claim on the suretyship arrangement was limited to four per cent; is that right?

A. I testified that, assuming that by virtue of law it was a transfer of the claim of the Bank to Mandl——

Q. Yes.

A. ——then he would be entitled to claim four per cent in case of default.

Q. From whom? A. From his debtor.

Q. Who, in your hypothetical case? Name him.

A. The same debtor against the claim of the Bank.

The Court: Universal? [280]

A. That must not necessarily be Universal. It could be Joe May, too, because he is entitled to claim contribution from Joe May. It could also be the May Film, because he is entitled to, if he satisfies the creditor, to have regress to the main debtor and to another guarantor.

Q. By Mr. Hirschfeld: In the hypothetical case, you mean, that Mr. Mandl might claim the full interest that is in the judgment as against Universal, but as against Mr. May or maybe against

(Testimony of E. O. F. Golm.)

the May Film Company he could only claim four per cent; is that correct? A. No.

Q. Under your hypothetical case, as you limit it?

A. Under the hypothetical case, that by virtue of law the claim belonging to the Bank and to the extent to which Mandl satisfies the Bank—which is to be borne in mind—has been transferred to Mandl, then he could claim this part only which he had paid and only interest of four per cent, because he could not seek satisfaction out of a security to a higher degree than his claim is valid. He acquires the claim only in so far as he satisfies the Bank. That is set forth in Section 774.

Q. Then, do you mean that if Mr. Mandl only paid 20,000 marks, for example, to the Bank fuer Auswaertigen Handel and received, by operation of law, these pledged articles, that he could make claim against Universal only for 20,000 marks plus four per cent interest? [281]

A. There is no doubt about that. I am completely sure. If Mr. Mandl—assuming the fact the debt was higher, of 80,000 Reichsmarks, as was stated here, and Mr. Mandl paid the remaining balance of 20,000 marks, then the claim belonging to the Bank was transferred, to him, by virtue of law, only to the amount of 20,000 marks, and his right to seek satisfaction out of any security—whether it was a stamp collection, whether it was a suretyship, whether it was real estate, whatever

(Testimony of E. O. F. Golm.)

it was—was limited by the amount to which he had acquired the claim. He could never ask for more than he was entitled to demand.

Q. If the claim is assigned to Mandl, by operation of law, against Universal, and assume the claim against Universal is for 100,000 marks, and assume that Mandl has only paid out the interest, as you figure it, 20,000 marks, then, if I understand you correctly, you say that Mr. Mandl may only take 20,000 marks?

Mr. Selvin: From Universal.

A. I don't say; the law says, completely and without any doubt. Section 774.

Q. By Mr. Hirschfeld: What happens to the other 80,000 marks; is that a present or profit to Universal?

A. Universal owes a debt, arising out of this judgment, to somebody, but not necessarily to a man who has only acquired part of this claim by operation of law.

The Court: They would still owe it to the judgment [282] creditor?

A. To the judgment creditor.

The Court: They would owe it to the original judgment creditor, to May Film.

A. Of course. And the Bank for Foreign Commerce has to assign it, if necessary.

Q. By Mr. Hirschfeld: Under German law Mr. Mandl has this: We will assume that by operation of law he owns this judgment against Universal,

¹(Testimony of E. O. F. Golm.)

and he wishes to go on this judgment. He has the right, under German law, to decide which of these various securities he will go after, does he not?

A. He has the right, yes. There might be a restriction, but he can assume he has the right, in general cases.

Q. It is true, is it not, Universal can say, "You must go after the jewelry first"?

A. Not necessarily.

Q. He can say "I am going after you first"?

A. Yes.

Q. So when he comes after Universal, in our hypothetical case, and he brings a suit, under the German law must he limit his demand in the suit to just how much he paid?

A. This is, without any doubt, to be answered in the affirmative. He has to say the following—he has to say to the court, to the German court, in this case: "I assumed responsibility"—let's say a suretyship—"toward the [283] Bank. Out of the suretyship I paid 20,000 Reichsmarks. Therefore, to the amount of 20,000 Reichsmarks, and with the restriction that it may not avail to the detriment of the Bank, I am now entitled to seek satisfaction out of this claim given as security to the Bank and, therefore, I ask 'May it please the court to condemn the debtor of this claim to pay to me the amount which I have paid.' "

(Testimony of E. O. F. Gohm.)

That means 20,000 marks with interest at the rate of four per cent.

The Witness: It is clear provision of the German law which can't be disputed by anybody.

Q. By Mr. Hirschfeld: Since, under your interpretation, he is limited to asking only, in our hypothetical case, for 20,000 marks, and he, by operation of law, is the owner of the claim, how does the Bank, as you have said, get the balance of the claim for itself?

A. The question contains a *contradictio in adjecto*, a [284] contradiction in its incorporation. Mr. Hirschfeld wants me to assume to be true that Mr. Mandl only paid 20,000 marks, but by virtue of law he acquired the claim to its full extent, which he did not. If he only paid 20,000 marks he acquired the claim only to that extent.

The Court: And the remainder of the claim is still in the judgment creditor?

A. Or the Bank.

The Court: And they could pursue whatever remedies they have to enforce it?

A. And they have the preference, as set forth in sentence two of this section.

Q. By Mr. Hirschfeld: If the Bank held as security this judgment, and Mr. Mandl, in our hypothetical case, only gets the right to, we will say, one-quarter of this judgment, and assume that the Bank got the judgment from Mr. May origi-

(Testimony of E. O. F. Golm.)

nally, and assume that the Bank is fully paid and has no more claim, is it not a fact that the Bank no longer holds the balance of the judgment?

A. The fact is that Universal owes the full amount, but it doesn't owe the full amount to the paying surety who only pays a part of it. And to whom he owes the other amount is a question of fact.

Q. I am talking about not who owes, but who owns. Who is the owner where the Bank is paid in full, let us say, and May Film pays a part, Joe May pays a part and Mrs. May pays [285] a part, and the last is paid by Mr. Mandl.

A. Yes.

Q. Each one in turn would receive a certain interest in this claim?

A. I understand the question.

Q. Since Mr. Mandl only receives part of the claim and since Mr. May, under our hypothetical case, would receive a part of the claim, do not these parts of the claim transfer from the Bank to the different people, by operation of law?

A. This depends on the legal position which these different people had, as to whether they bear suretyship or as to whether they are third persons who pay an obligation. If a third person pays an obligation of another person that third person does not acquire the claim. Only a suretyship acquires it. Let us assume that the debtor

(Testimony of E. O. F. Golm.)

paid 80,000 marks—I mean the debtor of the Bank paid 80,000 marks, and the rest was paid by the suretyship. Then the Bank was under the obligation to reassign 80,000 marks to the debtor and 20,000 marks to the suretyship.

Q. And therefore, in Germany——

A. I tried to make this clear.

Q. I think it is clear now, Doctor. Therefore, in Germany, where there was one claim held by one person—we will call it one hundred per cent—it may be broken up so that five people may each own a fraction of it, and the defendant may have to pay five different people? [286]

A. That is not the regular case, but such a situation can, under certain circumstances to be assumed to be true, arise.

Q. Assume that Mr. Mandl, in fact, paid more than the amount of the judgment to the Bank; then what is his position?

A. Assuming that Mr. Mandl paid more than the amount of the judgment, but he paid as a suretyship and he paid the debt of the main debtor of the Bank—that has to be added, otherwise I can't answer this question——

A. ——in this case he would acquire the claim of the Bank, amounting to more than the claim against Universal given as security. Therefore, of course, he would acquire the whole amount of the judgment.

(Testimony of E. O. F. Golm.)

The Court: And could recover from the judgment debtor the full amount and the balance?

A. It wouldn't be covered by security.

Mr. Selvin: That is, of course, if it passed to him.

The Court: Yes.

A. But that is only under the assumption that there was an operation of law. [287]

E. O. F. GOLM
(recalled)

Cross Examination
(resumed)

Mr. Hirschfeld: Read the last answer, Mr. Reporter.

A. The question is, if Mandl paid more than the amount of the judgment against Universal, then what was his position in this case? And I answered that if he paid more to the Bank than the claim against Universal amounted to, and if he paid this as surety—which has to be added—and in order to free the principal debtor—which has to be added, too—then, of course, he acquired the full claim against Universal. That is what I said. Then, I think your Honor said, “What became of the rest?” And I said, “This wasn't covered by the security.” [288]

Q. By Mr. Hirschfeld: Is there any particular way, in our hypothetical case, that Mr. Mandl had to make payment to the Bank in order to meet the

(Testimony of E. O. F. Golm.)

qualification that you have made in your answer, to-wit, paid as surety?

A. I don't know whether Mr. Mandl was a surety. If it is assumed that Mr. Mandl was a surety, yes.

Q. Is there any particular procedure or method of making a payment that Mr. Mandl would have to follow in order to pay as a surety?

A. No. If Mr. Mandl was a surety and made a payment, then the conclusion would always be that he made the payment in his capacity as a surety.

Q. Yes. I believe you said, Doctor, that under the present hypothetical facts, as you have heard them, that if Universal paid Mandl it was protected against a claim by the Bank, by virtue of the notice of the Bank to Universal that they should pay Mandl.

A. By virtue of this letter, yes.

Q. They would be estopped—is that the word?—the Bank would be estopped to claim any further?

A. Is it an English word?

Q. I am sorry. I thought perhaps it would be familiar. Prevented?

A. Prevented from? Yes. I thought you meant a German word.

Q. Doctor, is there any difference in the operation of [289] the transfer by law, under Section 774 of the Code and similar sections applicable to the situation, where A puts up his own, we will say, claim as security for the claim that A owes to B,

(Testimony of E. O. F. Golm.)

and the situation where A owes to B, and C puts up his security for the payment of A's claim to B, and in both cases assume that B receives the assignment of the claim that is given as security?

A. I have to confess it is a little bit complicated.

Q. Suppose A owes B.

A. A owes B. B is the creditor and A is the principal debtor?

Q. Yes. And A owns a claim against a third party, X. A. All right.

Q. And in one case A puts up, as security for his indebtedness to B, the claim which A owns against X. A. Yes.

Q. You have the situation? A. Yes.

Q. Now, let us say that A owes B some money, but C owns a claim against X and C puts up, as security for A's debt, the claim against X?

A. Yes, I understand.

Q. Now, in the first case, if A pays B, B is obligated, under the law of Germany, to immediately return the claim to A that A gave him that he had against X; is that right?

A. In case it wasn't given as a pledge, but was really [290] assigned to the full extent, then he is under the obligation to reassign it.

Q. To reassign it?

A. Yes. To give it back, as you call it.

Q. Let's take the second case, where A owes to B, and C gives to B a claim against X. Must B

(Testimony of E. O. F. Golm.)

reassign the claim to C when C pays the bill or debt?

A. The question is very easy, now. It depends only upon the interpretation of the ascertainment of what was C's position. Was C a man who said, "I am liable for A's obligation and I, therefore, assume a suretyship"? Then, it is the case of provision 774. But if C was a third person who had another obligation, or even no obligation, but just wanted to be helpful in this matter, for one reason or another, and put up a security, then there was no transfer by virtue of law, because a third person, who puts up security without being a surety, does not belong to the persons which Section 774 has in mind.

Q. But let us say that in this case C has obligated himself, as a surety, for A's debts to B.

A. I think it is a real case of Section 774.

Q. Now, let us take a third situation, where A owes to B and where C and D are sureties, and C puts up his claim against X, and D pays the claim.

[291]

A. Yes, it is clear to me with one restriction. You always say, "He puts up security".

Q. Yes, he puts it up as security.

A. In my opinion we have to distinguish whether he assigns it as security or puts up a pledge.

Q. Let us say he assigns it, under the understanding that is not disputed and is admitted, he

(Testimony of E. O. F. Golm.)

puts it up as security. Now, C puts up his security as a co-surety with D for the payment to B of A's debt. A. Yes.

Q. Now, instead of C paying to B, which is similar to what you said had to be a direct reassignment, D pays the obligation of C and himself; in other words, he pays both.

A. In other words, there are more than one surety?

Q. Yes, there are two sureties.

A. And one of the sureties pays a debt and the other surety gave the security?

Q. That is right.

A. There we have a special case which is provided for in Section 774, paragraph 2, and this section reads: "Co-sureties"—

Q. Will you just wait a minute until I get it, please? A. 774, paragraph 2.

Q. Go ahead now.

A. "Co-sureties are only"—this is to be emphasized, the word "only"—"Co-sureties are only liable toward each [292] other under Section 426." This means co-sureties, in the example which you gave me, D and C, as co-sureties, are joint debtors.

Q. Yes.

A. Which follows out of Section 769.

Q. Did you say that the co-sureties are liable to each other?

A. No, I didn't go over to Section 426 yet. I want to come to that part.

(Testimony of E. O. F. Golm.)

Q. But aren't those the words of 774?

A. "Co-sureties are only liable toward each other under Section 426." You cannot understand it without reading Section 426.

Q. But Section 426 deals with the liability of C to D and D to C, but does not deal with the obligation of B to reassign to D?

A. Oh, yes.

Q. It does?

A. Oh, yes; not directly, as it says, "Co-sureties are only liable toward each other under Section 426." And if you keep in mind what Section 769 says——

Q. Wait. Will you finish with 426?

A. This has to be connected here. Then Section 426 says that if they are joint debtors they are liable in their relation—I am quoting from my memory. Please correct me [293] if it isn't correct—are liable in their relation to each other, in equal parts. Section 774 provides for this case in your example, as follows: Since C and D are co-sureties and joint debtors in their relation to the creditor, but liable in equal parts in their relation to each other, it follows from this that a co-surety—in your case D, I think—who pays the whole amount can recover contribution in an equal part. That means to the half amount, from the other co-sureties. And in so far as a paying co-surety is entitled to claim contribution—what I am saying now follows again

(Testimony of E. O. F. Golm.)

out of Section 426 in connection with 401—in so far as a co-surety is entitled to claim contribution from another surety, to-wit, to an equal part, in so far as the securities put up by another surety are transferred by operation of law to him.

Q. By Mr. Hirschfeld: Thank you. That is very fine. Doctor, will you please examine Section 398?

Q. May we have your translation, please? [294]

A. “A claim may be assigned by the creditor, by agreement with another person to the latter (cession). From the conclusion of the agreement the new creditor (assignee) takes the place of the former creditor.”

Q. By Mr. Hirschfeld: The statement I have here, Doctor, is: “A claim may, by contract with another person, be transferred by the creditor to him (i. e., assignment). On the conclusion of the contract the assignee takes the place of the assignor.”

A. I can't see any essential difference.

Q. Thank you. Does the translation that you have have notes?

A. No—yes, it has some.

Q. Is there a note, that is correctly a part of the law, to the effect that the contract of assignment may be either verbal or in writing?

A. It has no note, as far as commenting on the text. It only refers to other—for instance, the Spanish law.

(Testimony of E. O. F. Golm.)

Q. By Mr. Hirschfeld: With respect to Section 399?

A. Section 399 says, "A claim cannot be assigned, if the [295] preference to another than the original creditor cannot be rendered without change of its nature, or if the assignment is excluded by agreement with the debtor." Do you want me to explain it?

Q. No. That is a correct statement of German law?

A. Yes, surely.

Q. And 400?

A. Section 400, "A claim cannot be assigned, in so far as it is not subject to attachment."

Q. And next, Section 401. I want to get to 410.

A. Section 401: "With the assigned claim, the mortgages or liens, belonging to it, as well as the right arising out of a security given for it are transferred to the assignee.

"The assignee can also claim a right of precedence pertaining thereto, in case of the levy of execution or in case of insolvency."

Q. Do you possibly agree that that statement is correct?

A. Section 401, paragraph 1, is correctly translated.

Q. Is this also correct, Doctor: "With the assigned claim the rights of hypotheca or pledge existing on its account and the rights arising from a suretyship established for it, pass to the assignee"?

(Testimony of E. O. F. Golm.)

A. No, that is not correct, because Section 401, in the German wording, doesn't speak about—oh, yes, that is right. It speaks about a suretyship.

Q. Thank you. Does it also state substantially that [296] the assignee may enforce any right of preference connected with the claim in case of compulsory execution or bankruptcy?

A. You are referring to paragraph 2 of 401?

Q. Yes. A. Yes, that is right.

Q. Will you say that Section 402 is substantially correct in the following words: "The assignor is bound to give to the assignee all information necessary for the enforcement of the claim, and to deliver to him all documents which serve as evidence of the claim, if they are in his possession"?

A. That is the provision I was referring to several times.

Q. Yes.

A. "The former debtor upon demand has to execute to the assignee a publicly authenticated instrument of assignment. The assignee has to bear and advance the costs."

Section 404: "The debtor may avail himself as against [297] the assignee of the defenses, which at the time of the assignment of the claim were good as against the former creditor."

Q. By Mr. Hirschfeld: Section 404, in your opinion, that limits any of the debtor's defenses under an assignment to those that existed as of the

(Testimony of E. O. F. Golm.)

time of the assignment of the original claim; is that not correct?

A. Yes, it limits it and explains it.

Q. By Mr. Hirschfeld: Please read your translation of Sections 406, 407, 409 and 410.

A. Section 406. "The debtor may set up against the assignee a claim due to him from the former creditor, unless he knew of the assignment at the time when he acquired the claim, or unless the claim did not become due until after [298] such knowledge and after the assigned claim became due."

Q. In your opinion does this apply to attachment as a set-off?

A. Yes, this applies to an attachment.

Q. Yes.

A. Well, there is no set-off. You can't set off against an attachment. I don't know what you mean.

Q. Isn't an attachment a set-off under German law?

A. Set-off is quite another thing from an attachment.

Q. Thank you. Will you now give us Section 407?

A. "The assignee must allow against himself a performance, which the debtor renders after the assignment to the former creditor as well as every transaction, which takes place after the assignment between the debtor and the former creditor regarding the claim, unless the debtor has knowledge of

(Testimony of E. O. F. Golm.)

the assignment at the time of the performance or of the transaction.”

Q. Is the word “Justice act” equally good there instead of transaction”?

A. I would prefer the word “transaction”, because the German word is “Rechtsgeschäft”, a legal transaction.

Q. Is an attachment a legal transaction?

A. Yes, attachment is a legal transaction. [299]

Q. Within the meaning of this code section?

A. No—well, there is a dispute about the words. It is a legal transaction in the meaning of this wording—Rechtsgeschäft, section 116—a voluntary transaction and not an attachment executed by force of state.

Q. A person, however, who gets the Amtsgericht to issue an attachment is doing a voluntary act; is that not true?

A. Yes, but not in the meaning of this section.

Q. Will you read the second part of the section or give us your translation?

A. “If in a lawsuit instituted between the debtor and the former creditor after the assignment, a final judgment has been rendered concerning the claim, the new creditor must allow the judgment against himself, unless the debtor knew of the assignment at the time of the commencement of the suit.”

Q. Section 408?

A. “If an assigned claim is again assigned by the last creditor to a third party and if the debtor performs toward the said party, or if between the

(Testimony of E. O. F. Golm.)

debtor and the third party a transaction is entered into or a legal controversy is instituted, the provisions of Section 407 are correspondingly applicable in favor of the debtor as against the former creditor.

“The same is applicable, if the already assigned claim is by judgment adjudicated to a third party, or if the [300] previous creditor acknowledges to the third party, that the already assigned claim has by virtue of law been transferred to the third party.”

Q. Would you take your German code and tell us, please, if the following is not substantially correct, as to the second paragraph?

A. Just a minute. I don't have it.

Q. Have you found 408? A. Yes.

Q. Is this substantially correct: “The same rule applies if the assigned claim is reassigned to a third party by judicial order, or if the assignor makes acknowledgment to the third party that the assigned claim is transferred to the third party by operation of law”?

A. I would only object to the word “reassigned” in the first part. I wouldn't say “reassigned.” I would say “transfer”, or maybe the better word, as it is used here, “adjudicated”, but not “reassigned”.

Q. What is the word in English, please?

A. Adjudicated.

(Testimony of E. O. F. Golm.)

Q. Adjudicated? A. Yes.

Q. Does that, in your opinion, mean only by an order of court?

A. Not only, but in this connection it means by an order of court. It says, "by judgment adjudicated". [301]

Q. But the second part of that sentence is all right? A. As you read it to me?

Q. Yes. A. Yes.

Q. Section 409?

A. Do you want me to read it?

Q. Please; your translation of it.

A. "If the creditor informs the debtor that he has assigned the claim, the notice of assignment is valid against him, as towards the debtor, even though the assignment had not been made or is not effective. It is equivalent to the notice, that the creditor has executed an instrument of assignment to the new creditor named in the instrument and the latter presents it to the debtor.

"The notice can be withdrawn only with the assent of the party, who is named as the new creditor."

Q. Referring to the first sentence, Doctor, is this substantially a correct translation of the German law, in your opinion: "If the creditor notifies the debtor that he has assigned the claim, the assignment of which he has given notice avails against himself in favor of the debtor, even though it was not made or is invalid"?

(Testimony of E. O. F. Golm.)

A. I can't see any essential difference.

Q. Thank you. Section 410?

A. "The debtor is obliged to perform to the new creditor only upon delivery of the instrument of assignment executed [302] by the former creditor. Demand or monition of the new creditor is ineffective, if it is made without presentation of such instrument and if the debtor immediately refuses the same on this ground.

"These provisions have no application, if the former creditor has notified the debtor in writing of the assignment."

Q. Would you say, Doctor, that the following is a substantially correct statement of the German law as to Section 410: "The debtor is bound to perform in favor of the assignee only upon production of an instrument of assignment executed by the assignor. A notice or a warning by the assignee is of no effect, if it is given without production of such an instrument, and the debtor without delay rejects it for this reason.

"These provisions do not apply if the assignor has given written notice of the assignment to the debtor"?

A. Well, I can't see at the moment that there is a substantial difference between this text and the text I read. [303]

Q. By Mr. Hirschfeld: Is it true that under the translation the provisions of Sections 399 to 404, which you just read, and the provisions of 406 to

(Testimony of E. O. F. Golm.)

410, apply to the transfer of a claim by operation of law?

A. Yes, because it is a special provision.

Q. You don't have to explain your answer. I would like to make this shorter, if I may.

The Court: No; you are depriving the witness, as an expert, from giving his reasons.

Mr. Hirschfeld: Very well.

The Court: Give the reason, Doctor.

A. The reason is that there is a special provision in our code which says that as to transfer of a claim, by operation of law, the provisions just quoted—other provisions are excepted—are applicable.

Q. By Mr. Hirschfeld: That is because of Section 412, is it not? A. Yes.

Q. Doctor, is it not also a fact that under the German law that if a third party satisfies a claim of the creditor the claim is transferred to him——

[305]

The Court: He has answered that this morning.

Q. By Dr. Hirschfeld: ——if the transfer can be effected without hurting the creditor under a general section of the law? That is not dependent upon either suretyship or guaranty, but under Section 268, which is not concerned with either of these situations?

A. I know the Section 268. I know what you have in mind. In my opinion, which is the opinion of the German Supreme Court, too——

(Testimony of E. O. F. Golm.)

A. —a third person who satisfies a creditor, without being a surety or without being a joint debtor or a person to whom special provisions are applicable, does not acquire the claim by operation of law.

The Court: You answered that this morning in the same manner? A. Yes.

The Court: He is a volunteer, in other words?

A. Yes.

The Court: And is not given any protection of the law, at all?

A. Yes. It isn't a contract.

The Court: There is no relationship; no judicial relationship by which any rights or duties are disposed; is that right?

A. That is correct, your Honor. [306]

Q. By Mr. Hirschfeld: In what manner, under Section 268, is a claim transferred to a mere volunteer, if that is your interpretation of 268?

A. This Section 268 is a special provision in the meaning which I just used. I said, "If there wasn't a special provision, as in the case of a surety or a joint debtor." This is a special provision which applies to a case of compulsory execution and it deals with the case where a creditor levies an execution onto an object which might be the property of a third person, or which is attached by a third person or in which a third person has a legal interest. That is what Section 268, paragraph 1, says. And

(Testimony of E. O. F. Golm.)

then it gives a special right to these third persons, in order to protect his own right to satisfy the creditor; and it provides, furthermore, that in this case only a transfer by virtue of law takes place. It is quite another case.

Q. Thank you. Now, Doctor, is it not a fact that under German law an arrangement of suretyship or an arrangement of guaranty is a contract within the meaning of the law? A. Surely.

Q. And is it not a fact that all contracts in Germany [307] shall be interpreted according to the requirements of good faith, ordinary usage and business usage being taken into consideration?

A. That is what I was trying always to point out.

Q. The answer is yes, isn't it?

A. The answer is yes.

Q. Is it not also the law of Germany that the debtor is bound to execute a performance according to the requirements of good faith?

A. You are quoting Section 242?

Q. That is right. A. That is the law.

Q. Ordinary usage being taken into consideration? A. Yes.

Q. Ordinary usage? A. Yes.

Q. Doctor, I believe you said that Section 765 is the only definition, or is the correct definition of a surety? A. In the meaning of this law.

Q. In Germany?

A. Yes; 765. Let me compare it. Yes, Section 765 gives the definition of what is a suretyship.

(Testimony of E. O. F. Golm.)

Q. Now, Doctor, if two people each guarantee and are good as a surety, within the meaning of the word, as you have used it, on one obligation, but they have not done it together, either relying upon the other, is it not a fact [308] that under the law they are liable as joint debtors, even though they have not assumed a suretyship in common, as understood in the law?

A. I just quoted this section two minutes ago.

Q. Section 769? A. Yes.

Q. That is correct? A. That is correct.

Q. Thank you. And it is true that a suretyship may exist for a money claim alone—do I make my question clear, Doctor,—and there was some discussion here as to a distinction between a guaranty and a suretyship, in which a warranty of performance and success was distinguished purely from an agreement to pay money; and I now ask you if it isn't a fact that under the German law there can be a suretyship only for a money claim?

A. There can be a suretyship not only for a money claim, but I would go a step farther and say that is the usual case of a suretyship; that somebody assumes the liability that another person pays a money claim. That is the ordinary type of suretyship.

Q. That is covered in Section 772, is it not? That is the section that makes that point?

A. The first sentence of Section 772 says, "If there is a suretyship concerning a money claim,"

(Testimony of E. O. F. Golm.)

and it goes on with what has to be done in this case in order to levy an [309] execution.

Q. And finally you have discussed a situation where the pledgor—you have used the word “pledgor”? A. That is right.

Q. You mean that is different than a surety, now, do you?

Mr. Selvin: You mean a pledgor would be different? A. The man who pledges something.

Q. By Mr. Hirschfeld: He is not the same as a surety?

A. No, he is not the same as a surety. A surety is a burge. A pledgor is a verpfander.

Q. A pledgor is not the man who owes the money and he pays the money. Is it not true that whatever was pledged in the entire transaction passes to him when there has been a payment?

A. I can't answer this question generally. I must have more facts in order to answer this question. If, for instance, somebody pledges a movable thing—I don't know what you have in mind.

Q. Well, will you please refer to Section 1225 and explain the German law——

A. That is what I had in mind.

Q. ——with reference to a situation where the pledgor is not the person debtor, but nevertheless a claim passes to him when he satisfies the debt?

A. In this case there is a special provision that this [310] pledgor has to be treated as if he were

(Testimony of E. O. F. Golm.)

a surety. Section 1225 says that in this case and under these premises the provisions given in Section 774, and applicable to a surety, are correspondingly applicable to the pledgor.

Q. Thank you.

A. But—excuse me—I am not quite sure whether this section is only applicable in case of pledging a corporeal thing, or also of pledging a right, because a later section which deals—this section is under the caption “Pledge on things”—on corporeal things, which is quite different from a right. And later on follows another title, another book, which I find, which deals with pledging of rights. And I am just looking up to see whether this section is correspondingly applicable in this case.

Q. You mean 1273?

A. 1273, paragraph 2, says that these provisions are correspondingly applicable in so far as it isn't otherwise provided by law. Now, of course, as far as I see there is no other provision. So, then, it would be applicable, too.

Q. Thank you. Is it not also German law that where there is a transfer of the claim, where there has been a pledge of movables, as you referred to it, that the pledge passes to the transferee and that the pledge cannot be transferred without the claim?

A. If I understand you right you refer to this Section [311] 1225, and it says that the same rules are applicable as in the case of a surety.

Q. Referring to 774?

A. 774.

(Testimony of E. O. F. Golm.)

Q. Thank you. Now, you have made a distinction as to the difference between movables and a claim or a right? A. That is right.

Q. But isn't it a fact that under German law the claim of a pledge or a right is effected according to the provisions applicable to the transfer of rights, and that if, for the transfer of the right, the delivery of something is necessary, that the provisions of 1205 and 1206 do apply?

A. I think that is the question you asked me this morning, what is necessary to pledge a right, and if it is done by way of assignment. But if this assignment is an assignment only—in using the German word “abtretung”—without making any implication that it isn't an assignment to its full extent, it wouldn't be considered as a pledge; it would be an assignment; and the Section 398 and following, which we just read, are applicable.

Q. Would you not have to refer to Sections 1274 to 1296 to see if a contrary intention was not desired? A. Which section, please?

Q. 1274 to 1296.

A. Section 1274 says what I just said, that a pledge as to a right is made by assignment. I don't know what I [312] have to add.

The Court: You explained that yesterday. You said a pledge as to a thing, it must be delivered.

A. Yes. If it is a corporeal thing he has to deliver it, and as this section also speaks about the

(Testimony of E. O. F. Golm.)

delivery of a thing, then, for instance, it applies to the example you asked me this morning, for example, how can I pledge a story. And I said you have to pledge the copyright and to deliver the story.

Q. By Mr. Hirschfeld: Doctor, did you testify as to the rights of a director of a corporation to sell assets?

A. You mean a member of the governing body?

Q. Yes.

A. I was asked several questions in this case and I testified——

Q. By Mr. Hirschfeld: Yes. You will recall that his Honor the court questioned you with respect to rules and reasons that existed where there were creditors.

A. Oh, yes, I recall.

Q. And without going into your answers at great length I would like to ask you generally if the general rules of German law, designed for the protection of creditors, were in your mind at the time you made answer to what has to be [313] done in the question of selling an asset? You were thinking of creditors, were you not?

A. His Honor the court asked me whether it is permissible that the governing body transfer the assets of a company without the assent of the creditors. I think that was the question.

Q. Yes.

A. As far as I recall I answered that a transfer of assets made under such circumstances may be

(Testimony of E. O. F. Golm.)

valid, but our law knows the conception of a so-called relative invalidity, if that is the correct English word—relatively invalid. And this applies to the case when a governing body transfers assets to the detriment of the creditors, and the creditors, therefore, are entitled to challenge—I think I used the German word “*anfechten*”—that transaction.

Q. Is that based on Section 303 of the Civil Code—of the Commercial Code?

A. I have to confess that I don't know, from my memory.

Q. I am sorry, Doctor. I thought that was——

A. Which one?

Q. 303.

A. That is a special section which says that a transfer of the property, of all the assets of a stock company in the whole, is not permissible without the consent of a meeting of the members. But this wasn't the question which I had to answer yesterday. [314]

Q. But it is true that the corporation may sell all of its assets without the consent of the creditors; isn't that so?

A. It may be without or with consent. It is quite another question whether it is valid against the creditors.

Q. Well, is it not a fact that if a corporation sells all of its assets this acts as a dissolution of the corporation?

A. As a dissolution?

(Testimony of E. O. F. Golm.)

Q. Yes. A. It must be.

Q. Isn't that what Section 303 provides, that if all the assets are sold that that is the effect?

A. Yes.

Q. If it has been done by an authorized resolution, that is, if the sale has been authorized, the effect of the resolution is to dissolve the company?

A. Yes, but you asked me if a corporation sells all of its assets.

Q. Yes.

A. It is different whether a corporation sells all of its assets or whether the corporation sells its property in the whole. If you could read German you would see the words "vermogens im ganzen". But, of course, this has the consequence that the corporation has to be dissolved.

Q. I am not concerning ourselves now, Doctor, with whether or not the corporation must turn over to the [315] creditors the money that it gets when it sells all of its assets. What I am concerned with, it is a fact that if the corporation desires to sell all of its assets it may do so without the consent of the creditors, as provided by Section 303?

A. Yes.

Q. That is right. And it is also right that if they do this by a resolution it has an automatic effect of dissolving the corporation; isn't that so—the second paragraph?

A. Yes, that is right. Then you start your liquidation.

§(Testimony of E. O. F. Golm.)

Q. Yes.

A. Then you start your liquidation.

Q. In the case that we have been discussing here you have been shown, have you not, a resolution to sell a certain asset?

A. Not an asset.

Mr. Hirschfeld: I will withdraw the question.

Q. We were discussing the sale, by a corporation, of one particular asset.

A. Excuse me; we were not discussing this.

Q. Well, were we discussing a transaction by which Joe May acquired the claim against Universal by virtue of the resolution of the board, consisting of one person, Miss [316] Loewenstein?

Mr. Hirschfeld: Well, we will call it a statement of the board or signature of the board.

The Court: What the record shows is an agreement of two stockholders to a division of assets and a later assent of the sole director to the arrangement.

The Witness: It was an agreement between Ausenberg and Joe May. And the claim against Universal is not mentioned in this agreement, but by interpretation of Miss Loewenstein it is included in this agreement in the claims which are not very sure—dubious.

Q. By Mr. Hirschfeld: As a matter of German law, where there is sort of a blanket consent given that does not mention anything specifically, the person who signs it can control the effect of that docu-

(Testimony of E. O. F. Golm.)

ment by stating the intent at the time it was executed? The intent of what was in the mind of the [317] person who made it is what rules where it isn't clear; is that not so?

A. Yes; the meaning of the interpretation—I don't know. I am confused.

A. This answer is not clear. As a means of interpretation in the case where a contract or another transaction is ambiguous, the intention of the person, what he had in mind, [318] may be used.

The Court: If the contract is clear as to its meaning——

A. No interpretation is necessary.

The Court: ——no interpretation is needed?

A. No interpretation is necessary.

The Court: Because, then, you would interpolate or intend something that may be absent?

A. Therefore, I didn't want to leave my answer——

The Court: That is a general rule of statutory interpretation that obtains in almost every country.

A. The gentleman asked me this morning if a contract is clear or another document is clear, or somebody says, "We have interpreted this in another way." This would never be sufficient under our law.

The Court: All right.

Q. By Mr. Hirschfeld: Doctor, it is the policy, also, of the German law, is it not, to try to give

(Testimony of E. O. F. Golm.)

effect to a document to make it valid, rather than interpret it so it will not be valid?

A. That is the general intention of the German law that applies to wills, of course——

Q. Only to wills?

A. ——but not to any document whatsoever.

Q. Well, maybe you don't understand me. I understood you to say, according to Section 157——

A. It is something quite different. It says that for [319] the interpretation good faith and——

Q. And ordinary business usage?

A. And ordinary usage has to be used as a means of interpretation; but it doesn't say in order to maintain a document, rather than to make it void.

Q. Yes.

A. Just the use of good faith, in German cases, can lead to the result that such a contract has to be considered void, following good faith. [320]

Q. By Mr. Hirschfeld: If a corporation has a certain asset is there anything in the German law that prohibits that corporation from selling that asset to a member of its board, if there are no creditors? A. To a member of its board?

Q. To a member of the corporation, and if there are no creditors and if the man who receives it pays full value for it?

A. There is no prohibition in the German law to sell—if I may repeat it, to make sure I understood your question.

(Testimony of E. O. F. Golm.)

Q. Yes.

A. ——to sell an asset belonging to the corporation to one of the stockholders, by a legal transaction, of course, executed by the governing body.

Q. If such a sale is made and the document that is executed under the circumstances is in the form that you have examined in the deposition of Johanna Loewenstein— [323] I think you have looked at it.

A. I would like to look at it.

Q. Yes. You have testified to it.

Mr. Selvin: It isn't in her deposition. It is in the record of that declaratory judgment.

Mr. Hirschfeld: Yes.

The Witness: You want me to look in the judgment; this declaratory judgment?

Mr. Hirschfeld: Yes.

The Witness: Which quotes from the deposition of Johanna Loewenstein?

Mr. Selvin: I think it is contained in either the complaint or the brief of counsel, as a matter of fact.

Mr. Hirschfeld: It is Plaintiffs' Exhibit 3.

Mr. Selvin: If you are referring to what I called to his attention on direct examination, it is this quotation on page 181 and this on page 184, which I think are exhibits to the complaint in the case in which plaintiffs' Exhibit 3 is the record.

Q. By Mr. Hirschfeld: Will you examine this again, please?

(Testimony of E. O. F. Gohn.)

A. Well, I know now what it is. This is a part of the agreement between Mr. May and Mr. Ausenberg, and this is the balance sheet bearing the signature of Miss Johanna Loewenstein.

Q. Yes. Under such a transaction, if it is shown that [324] there were no creditors existing at this time and if it is shown that Mr. May, in this hypothetical question you answered, paid full value for the asset, and that at the same time the asset of the claim was an adverse judgment, and assuming further that Miss Loewenstein said that her intention—well, I will withdraw that part. The court doesn't want that in. Do you know of anything in German law that would prevent this from becoming a valid transfer?

A. I am perfectly willing to stand by the answer which I gave yesterday. This is not a transfer, in my opinion. It has another meaning and is an agreement between the two persons named, that certain assets should pass to them. And these assets, which, by the way, are not named, may also appear in this interim balance sheet; and the fact alone that this interim balance sheet has been signed by the then only member of the governing body is, in my opinion, not a legal transfer, of this claim in question, to the stockholder. **And** the question which you kindly wanted me to assume to be true, as to whether there are creditors, or not, existing at this moment, would prevent this agreement to be a real transaction, is not important,

(Testimony of E. O. F. Golm.)

because in itself it does not constitute a transfer. It means, in my opinion, that the proceeds of these assets should, in the relation between Aussenberg and May, and maybe also in the relation to the corporation, if they were to be recovered at this time, at the time the law suit was lost in the first instance, would [325] be his benefit.

Q. You mean belong to him?

A. Not belong to him, but have to be transferred to him. But it was only an obligation between Aussenberg and May, that Aussenberg said, "I am no longer interested in these assets and whatever will come out of them that might be yours. You are the only stockholder." That is quite another thing.

Q. But suppose the corporation delivered these assets at that time to Mr. May, then this, according to your statement of German law, completes the transaction then and there, does it not?

A. The delivery of the assets could take place if these assets were jewels or stamp collections or other things that could be bodily transferred. If it was a claim that was in question, a real assignment by the governing body had to be executed that would replace the delivery, or would be the proper delivery in that case.

Q. By Mr. Hirschfeld: Where there is only one director of a corporation is not an oral assignment good?

A. An oral assignment could be sufficient if it was a [326] real assignment.

(Testimony of E. O. F. Golm.)

Q. Well, why do you qualify that?

A. Because I don't know whether you want me to interpret this as an oral assignment.

Q. I don't ask you to interpret this document as an oral assignment. I am questioning as to the law. If, at the time this was done, an oral assignment was made simultaneously as a part of this transaction, that would be good, would it not?

A. Under these circumstances—may I name the governing body by name—Miss Loewenstein should say, in executing this agreement, “To which I assent, I herewith assign the claim against Universal, in my capacity as the only member of the governing body, to you, Joe May.” This would be a real assignment and it isn't necessary that it be written. The question whether it should be written usually is another one.

Q. But where there is just one person who owns all the stock and just one person who is a director, is it necessary, under German law, that these very technical legal words that you have quoted, be used? Would not simple words that a director, not a lawyer, intending that, “Now, this is yours,” be good enough?

A. I think the words I used are simple, that “I assign you this claim.”

Q. He does not have to use the word “assign”, does he? [327]

A. He may use another one, but I don't know any other one.

(Testimony of E. O. F. Golm.)

Q. By Mr. Hirschfeld: If it appears from the balance sheet that the money was paid, is this circumstance, together with the fact that the claim is eliminated from the balance sheet——

A. I can't see that it is eliminated from the balance sheet, because it isn't mentioned.

Q. You don't see it in the balance sheet, do you?

A. I don't see anything in the balance sheet, only the usual balance, assets and liabilities.

Q. Will you please answer this question, though, without telling me other things?

A. I will try to. [328]

Q. You don't see that it is in the balance sheet, do you? This claim is not included in the assets?

A. No. No asset is mentioned.

Q. And according to the balance sheet 45,000 marks was paid; is that right?

A. This balance sheet mentions as assets——

Q. Upon an examination of that balance sheet, according to the interpretation of German law is it not apparent that there isn't included therein, as an asset of the corporation, any claim against Universal Pictures Corporation?

A. I can answer only this: There doesn't appear the payment that you asked me before.

Q. By Mr. Hirschfeld: No. Just one question at a time, because your counsel may want to object to each one. So confine your answer to my last question alone, if you can [329] answer it.

(Testimony of E. O. F. Golm.)

A. I thought your question consisted of two parts.

Q. No.

A. If you only want me to answer the last part, I may say that this balance sheet does not say that there was a claim against Universal, nor there was another claim, nor any claim.

Q. Does this balance sheet, under German law and as interpreted by your courts, indicate whether or not there was 45,000 marks in cash on hand on this date?

A. It doesn't say "In cash on hand." It says it is capital in shares, consisting of 45,000 marks. The capital of a stockholder company is never an asset. It is always a liability.

Q. Under the German method of showing these and the force and effect of these balance sheets, it does show the 45,000 marks as a credit?

A. As a capital in shares; in stocks.

Q. Will you tell us the force and effect of a balance sheet such as this? What is its legal effect under German law?

Q. You can confine your answer and say in part it [330] indicates whatever you want to say.

Mr. Selvin: Just a moment. I will object to that upon the ground that the witness' qualifications as a mind reader have not been established. How does he know what you want? I insist that your question be more definite. A balance sheet in one context may have one meaning and in another context may have a different meaning.

(Testimony of E. O. F. Golm.)

The Court: Objection sustained. The witness has told us half a dozen times what was done. He has interpreted and reinterpreted it.

Mr. Hirschfeld: I don't mean to ask the question over. The court apparently ruled against us. I would like to make a change. I would like to ask the witness, with your Honor's permission, whether or not an oral assignment under German law must contain any formal words.

The Court: He has answered that. He said the legal words are very simple and he couldn't use any other words than the words, "I assign." He just said that three minutes ago.

Mr. Hirschfeld: I didn't understand whether that would mean——

The Court: I will have the answer read. There has to be a stopping place somewhere.

Mr. Hirschfeld: I mean, could not legally, or as a matter of usage of words——

The Court: As a usage of words. He said, when you use [331] the words "I assign" in German it means "I assign", and it couldn't mean anything else. That is what he said.

Q. By Mr. Hirschfeld: Doctor, in German law if a person says, "I give it to you," is that good as an assignment?

A. It could be an assignment, yes. "I give it to you", means, "I transfer it to you".

Q. Suppose we say, "It is yours." Is that a good assignment?

(Testimony of E. O. F. Golm.)

A. I wouldn't say that.

Q. "From now on it is yours"?

A. It is impossible to answer this question. It depends upon the circumstances.

Q. If all the parties present know what they are talking about and they are discussing certain things, and the person who has the authority to make the assignment says, "All right, now, take it. It is yours"?

A. In most cases I would say it is a promise and not a transfer. For instance, in English you say, "It is yours. I leave it to you", or something like that. That doesn't mean, "I herewith assign it to you," but, "I am perfectly willing to give it to you." May I refer to an instance like a picture on the wall? It is very beautiful and a guest likes it very much. The host says, "You like it so much it is yours." I wouldn't say it was transferred—the property. It could be; but this is so intricate a question that I would rather let the circumstances—— [332]

Q. By Mr. Hirschfeld: Well, aside from the fact that it is a joke——

A. No, not a joke.

Q. Well, suppose we are concluding a deal and I say, "It is yours." That is good as an assignment, isn't it?

A. It seems rather strange to me, I would say.

Q. I don't care whether it is strange. I mean under the law.

(Testimony of E. O. F. Golm.)

A. Under the law it isn't excluded. It could be considered as to be an assignment.

The Court: Depending upon the circumstances; if they have something physical; corporeal.

Q. By Mr. Hirschfeld: And if the words used by the person is also accompanied by that person's then immediate attempt to assign it, then it is good without any argument at all, isn't it?

A. If a person uses the words, "I give it to you," and really means, "I herewith assign it to you," and the other person understands it in the same way, these are circumstances that would lead to the conclusion that it is an assignment.

Q. But must the other person understand it? Isn't it sufficient that the person who makes the assignment has the [333] intent?

A. The other person has to understand it, because it is a contract.

Mr. Hirschfeld: That is all.

Redirect Examination

Q. By Mr. Selvin: Under German law, Dr. Golm, does a sale, either of a movable or of a right in itself, transfer the title to the thing sold?

A. No. This question has to be answered no. We have a strict distinction between the obligation created by the sale and the fulfillment of the obligation, which is another transaction. It may consist in the delivery or assignment or something else. [334]

Q. By Mr. Selvin: Dr. Golm, in your cross examination [336] there were certain references

(Testimony of E. O. F. Golm.)

to the phrases "Mercantile trader" and "Mercantile transaction". You understand those terms have one particular technical significance in American law. Do they have any technical significance in German law? A. Yes.

Q. By Mr. Selvin: Is there any provision under the law of Germany, requiring the effectiveness for the pledge of a claim, that notice of the pledge be given by the pledgor to the debtor?

A. That is right. As I said before, the pledge of a [337] claim is following the rules of assignment. That means an assignment of the right has to be made. But if it is only an assignment, without any addition, it wouldn't be an assignment as to a pledge. And furthermore, there is a specific provision in Section 1280 which says that the pledge of a claim, to which transfer or assignment is sufficient, is without effect or has only effect if the creditor notifies the debtor of this assignment.

Q. Mr. Hirschfeld, in the course of his cross examination, gave you a number of hypothetical cases in which he used, first, A and B; then A, B and C; then A, B, C and D; cases in which, as he put it, a claim was put up as security for a particular indebtedness; and then asked you in each case whether or not there would be a transfer by operation of law to any particular party upon the payment of the principal indebtedness. In giving your answers to those particular hypo-

(Testimony of E. O. F. Golm.)

thetical cases did you make any assumption as to the type or nature of the transaction or security?

A. I think I did. At least, it was in my mind to do it. And I always said, if this security was given as a pledge, as a lien, or something of this kind, then this would be correct; and in another case, if it was a real assignment, which, also, only had the consequence that the creditor was under the obligation to free the security, to reassign the security or the claim, then there were other consequences.

Q. Then at Mr. Hirschfeld's request you also read into [338] evidence Mr. Loewy's translation of Section 398, et cetera, of the Civil Code of Germany, and certain questions were asked you in that regard. Let me ask you one question with regard to these sections: Do they apply to a transaction where there is no transfer by operation of law of the particular security involved?

A. The question is as to whether or not the sections 398 and the following sections are applicable in cases where there is no transfer of right by operation of law, do I understand?

Q. By Mr. Selvin: That is right.

A. This answer is very simple. Never; because Section 412 says—I think it is Section 412—very clearly that in cases where there is a transfer of right by operation of law, these foregoing provisions are correspondingly applicable. That means, in other words, in case where there is no transfer

!(Testimony of E. O. F. Golm.)

by operation of law, these sections are not applicable. They couldn't be.

The Court: Just the reverse.

Q. By Mr. Selvin: In determining the law of Germany [339] with respect to any particular problem——

A. Just a minute. I am not sure about 412.

Q. It is 412. I checked it.

A. That is right.

Q. In determining the law of Germany as to any particular problem or situation, Dr. Golm, are the codes, civil and commercial, and whatever codes and statutes there may be in Germany, the only sources of law?

A. They are the only direct sources, but we have to rely on decisions which have given us interpretation of these sections, and in many cases these interpretations have become common knowledge of a court. We have to rely, furthermore, on certain commenting editions which give an interpretation of certain provisions——

A. ——which may not be completely clear without the interpretations.

The Court: In other words, they rely upon commentators who, because of their scholarship and their special knowledge of the law, are recognized as authority?

A. As certain authority. And in many cases we rely upon such special authority.

Q. By Mr. Selvin: Is it possible, under the law of [340] Germany, for a person to become a

(Testimony of E. O. F. Golm.)

surety for an obligation of some sort, other than the obligation to pay money?

A. That is possible.

Q. And I think at Mr. Hirschfeld's request some reference was made to Section 1225 of the Civil Code, and in reading the English translation I think you read only the last sentence. For the sake of completing the record will you read the entire section?

A. Section 1225 says: "If the pledgor is not the personal debtor, the claim, in so far as he satisfies the pledgee, is transferred to him. The provisions of Section 774 in force as to a surety correspondingly apply."

Mr. Selvin: Subject to the reservation of my right to identify a translation of this decision to which we have had reference, that is all. We rest.

Recross Examination

Q. By Mr. Hirschfeld: Under Section 1280 is it your understanding that this overrules completely and negatives the effect of Section 409?

A. It doesn't overrule it. It isn't even a contradiction to this. Section 409 is dealing with a real assignment and it says that if the creditor informs the debtor that he has assigned the claim, and so on, then it says what happens. And Section 1225 deals with transfer by virtue of law. [341]

Q. Did I say 1225? I meant 1280.

A. 1280? If you said so I made a mistake. Section 1280 deals with a case where a right is not as-

(Testimony of E. O. F. Golm.)

signed to its full extent, but only as a pledge, and it adds to the effect of this assignment a further requirement.

Q. That is one of the reasons why they never pledge, but always assign, isn't it?

A. It is one of the reasons why banks, especially, prefer an assignment to the full extent, and not a pledge. And it is one of the reasons because never, in operation of law, the transfer takes place; but always the bank holds the security until the bank is satisfied, until the bank re-assigns it.

Q. I don't want to correct you, Doctor, on your translation of Section 412, but as I understood it you translated that in the negative. You said that 412 says that the provisions of Section 399 and following do not apply to the transfer of a claim that is not transferred by operation of law.

A. No. You misunderstood me. I said, and I read the translation which I have before my eyes——

Q. Please read it again.

A. It says, "As to transfer of a claim by virtue of law, the provisions of Sections 399 to 404, 406 to 410 are correspondingly applicable." And in answering the question which I was asked by Mr. Selvin I said it follows from this [342] section that the Sections 399 and following are not correspondingly applicable in cases where there is no operation of law. It is just the reverse.

Q. That is a conclusion; that last part?

A. If you call it a conclusion.

(Testimony of E. O. F. Golm.)

Q. The first part of the translation ends with the affirmative?

The Court: That was very clear from the witness' previous statement. He said, by the very fact that they say this applies where there is a transfer by operation of law, means that if there is no transfer by operation of law then it does not apply. He didn't read it from the translation. He merely said what the reverse of the proposition is was true.

Q. You have stated that in your opinion the commentaries and Supreme Court decisions have a certain effect upon the code law.

A. I think I didn't say they have effect as to the law. I didn't want to say they create law. I say they are very valuable as a means of interpretation, and sometimes we have [343] to rely on such decisions, especially those rendered by the Supreme Court, and also rely on authorities in special fields of law.

Q. Now, my question is this, Doctor: That regardless of how high the court in Germany and regardless of how high and great the author of the commentary may be, no interpretation that they give can ever have the effect of overruling any of the code law?

A. That is undoubtedly correct. An interpretation can not overrule a statute or a provision. Then the interpretation would, by way of my meaning, would no longer be an interpretation. But if it overrules a statute or provision that means that the

(Testimony of E. O. F. Golm.)

determine whether in your opinion it is a correct translation, I will allow you to do that, but there will be no cross examination as to this offer at this time. This was given as a result of your objection yesterday to the statement that he was relying upon that opinion. So I will not rule on the admission now, but will reserve the right to rule later, when you inform me that you are satisfied or not satisfied with the translation. That is all it is offered for. All right; step down, Dr. Golm. We will give it a number for identification.

The Clerk: Defendant's Exhibit E for identification.

The Court: You renew the offer later on, after counsel have had an opportunity to examine it during the noon recess. [347] Anything further?

Mr. Selvin: That is all. [348]

Plaintiffs' Rebuttal

JOE MAY

recalled as witness in behalf of the plaintiffs in rebuttal, testified further as follows:

Direct Examination

Q. By Mr. Blum: Mr. May, are you familiar with the party by the name of the Mr. Aussenberg, or were you familiar with a party by the name of Mr. Aussenberg in 1930? A. Yes, sir.

(Testimony of Joe May.)

Q. Were you familiar with him during August, 1930? A. Yes, sir.

Q. During that period of time did you have any business transaction with Mr. Aussenberg?

A. Yes, sir.

Q. Was there any document executed as the result of that transaction? A. Yes, sir.

Q. Do you know where that document is at the present time? A. No.

Q. Where was it the last time you saw it?

A. The last time I saw it was in Berlin in my offices at Francesstrasse.

Q. When was that? [349]

A. It was 1932, before May Film went into liquidation.

Q. Did it remain in Germany?

A. Probably, yes.

Q. Did you bring it to America with you?

A. No; because it is in the files of the May Film Corporation. The May Film Corporation owns the papers, and it has been in the hands of the liquidator.

Q. Have you any copy of the document?

A. No.

Q. Do you recall what the document contained?

A. Yes.

Q. I will show you Plaintiffs' Exhibit 3, page 3 thereof, and ask you if that document contains any part or portion of that agreement?

Mr. Selvin: Just a moment. I object to the question on the ground that it isn't proper rebuttal;

(Testimony of Joe May.)

upon the further ground that no foundation has been laid sufficient to justify the introduction of secondary evidence. And I would like to point out, your Honor, that in the case in chief the plaintiff apparently relied, for proof of his chain of title, upon various court records and upon various recitals in documents which are in evidence. Whether or not they are proved is a question of argument. We have not denied the existence of the particular documents. We have denied their legal effect. To permit them now to go back and prove their chain of title by proving other and additional facts, it [350] seems to me is not proper rebuttal, and places the defendant at extreme disadvantage in this case.

Mr. Blum: They have denied the efficacy of that judgment and the legal effect, if your Honor please. Therefore, as rebuttal, we are compelled to show what facts did occur.

The Court: I know of no principle of law which allows that to be done. The legal effect of the document is determined by its face. You can't show it was something else.

Mr. Blum: We have not shown the contents of that document in full. It is in Germany, and your Honor has made a ruling that documents in Germany are secondary evidence.

The Court: If you are relying upon those documents as chain of title, I am not going to allow any of them that were not brought in on your direct examination.

(Testimony of Joe May.)

Mr. Blum: You Honor, this part of the document we rely upon is contained in it. It is the agreement between Aussenberg, Joe May and May Film Corporation, whereby Joe May acquired his title, and thereby passed it on to the Bank for Foreign Commerce, and the Bank for Foreign Commerce to Mandl. That is one of the questions. But this is between May Film, Aussenberg and Mandl. It is part of the documents in the record.

The Court: What reference is there in these documents to the document you are trying to prove?

Mr. Blum: The judgment in the declaratory judgment [351] contains a portion of that document and the recital of the document.

Mr. Selvin: The judgment doesn't; the complaint does. The complaint in the declaratory case in Germany, between the Bank and May Film Corporation, contains a quotation of paragraph 3 of the agreement between Aussenberg and Mr. May. May I say that if that agreement, between Aussenberg and Mr. May, is a link in their chain of title it should have been proved in their case in chief, and not after we have rested and excused one of our witnesses.

The Court: You either stand on that judgment and the recital, or go back of it. And you cannot go back of it. I am willing to agree that any document in Germany may be proved by secondary evidence, because of the war conditions. But let us

(Testimony of Joe May.)

assume I would do that, although I doubt very much that I would be justified in brushing aside the rule, the mere fact that this is part of the agreement doesn't give you permission to put in the rest because it isn't part of the judgment. You are relying upon this judgment. Therefore, all that appears in the judgment is material; and things outside of the judgment couldn't be material.

Mr. Blum: It is rather strange to me, your Honor, that where we rely upon a judgment and they are permitted to go back of the judgment, that we are not permitted to rebut it.

The Court: They have not offered evidence of the judgment. They have merely produced experts to show that [352] in their opinion this document does not have the legal effect which you claim for it. You can produce experts to show that it does. They have challenged the judgment; they have challenged the legal effect. They say, "This document, being as it is, does not have the legal effect."

Mr. Blum: They have said that this document, as it appears in part, does not support that judgment.

The Court: But you cannot come back now and produce other documents that prove the rest of the document. Either you *rely your* judgment or you do not rely upon it. You can not rely on both, and when your judgment is challenged say, "All right; the judgment isn't any good. I will prove the facts which support the judgment, on rebuttal." That is

(Testimony of Joe May.)

switching entirely your ground of attack. All they have done is to say, "This judgment does not have the legal effect that you, as plaintiffs, claim for it." As I gather now, what you are trying to do is to prove the agreement in toto so as to be able to argue, if I anticipate your argument, that even if we assume that the judgment, as it stands, does not have the legal effect, we can produce facts to show that in reality an assignment took place. That is, to my mind, what you are trying to prove. Isn't that correct?

Mr. Blum: Not quite, your Honor.

The Court: All right.

Mr. Blum: But if I understand your Honor, your Honor states that Universal is saying that while there is a [353] judgment, May Film no longer owned the judgment, but Joe May owned it; that that judgment does not adjudicate that fact.

The Court: I am not saying that. I am not determining the case. I am merely saying that you produced the judgment, you plead it in your complaint as a basis of your title, and the recital of your judgment is in your complaint. They have challenged the judgment solely upon the ground that it does not show title in the plaintiff. You, as plaintiff, must prove your derivative title. They have said, "We will stipulate that this judgment was rendered, but we produce a witness who says this document, this judgment is not an assignment." Can you come now and say, "This judg-

(Testimony of Joe May.)

ment, upon which I rely, is only partial, because it recites a document; and I am going to refute the document and prove it by secondary evidence to show that there was actually an assignment which was binding upon the defendant and which shows the chain of title." Let us assume this: Suppose this case were a judgment of a state of the United States and this action were in this court under the case of *Erie vs. Tompkins* I would have to take judicial notice of the particular state, not only as far as statutory law is concerned, but also so far as the common law is concerned. Then suppose the defendant offered absolutely no evidence whatsoever; they could have admitted the judgment; they could have offered no evidence at all as to the meaning of [354] the terms, but supposing they would have said, "We now rest," and started to argue the legal effect of the judgment upon which you rely. Could you, if that were the case, come back and say, "They are challenging it not by evidence as to the facts, but merely by legal interpretation." Could you come back and say, "I ask the privilege of going behind the judgment and show documents of assignment which do not appear in this judgment." Could you have done that?

Mr. Blum: No, not if the defendant said, "Here is a judgment which says something on its face." We say, as a legal effect, that is correct, your Honor. But if they say, "That judgment is not

(Testimony of Joe May.)

correct, because there must be some evidence back of that," and we can show——

The Court: They have not offered any proof. It is mere speculation. They have merely offered an expert to show why, in his opinion, that document does not have the legal effect. They are challenging it on that ground, on the ground that it isn't a judgment in rem, but is a judgment in personam and, therefore, is not binding on the claim against Universal; not because of any facts which they produce in the record, but because of the particular principle that they were not made a party. In other words, they have not offered any proof of any fact attempting to go behind the judgment. They merely say, "This judgment does not amount to what the plaintiff claims it does, for various reasons," which I have already given. How can that justify you in [355] bringing up witnesses who will testify to facts which are behind the judgment, so as to put you in a position to say, "This judgment does that, not because of its recital, but because of other facts which it has failed to recite."

Mr. Blum: My argument is this: that whether they have or have not introduced any evidence showing what is behind that judgment, they have assumed facts and said, "Because there must be this and must be that. There must have been this or there couldn't have been that."

The Court: Those are merely hypothetical ques-

(Testimony of Joe May.)

tions put to an expert whose testimony I may disregard and will disregard if it doesn't carry conviction. He is not testifying to the facts. He is merely telling you that because of certain principles of law it doesn't do that; but nothing he says is evidence of anything beyond the face of the judgment.

Mr. Blum: Nor is there any evidence on their part that there wasn't an assignment from May Film Corporation to Mr. May.

The Court: It is a question of law. It isn't a question of fact. They have not made a factual challenge of this judgment and you cannot go behind it. Otherwise, we will be trying that case. The minute you do that we will be trying, in this American court, the German law; whether there was an assignment under the German law; whether there was an assignment other than by the judgment itself. You start out, in the very beginning of your complaint, by defining the [356] Landgericht, a court of general jurisdiction, then you talk about the Kammergericht, then you start in, "That on or about March 4, 1930, a judgment was rendered in said Landgericht, in an action entitled, "May Film Corporation, represented by its directors, Joe May, and Manfred Liebenau," versus defendant, Universal Pictures Corporation, represented by its attorneys * * * which said action is numbered 74.O.590.26/70 * * *

"That thereafter plaintiff appealed from the

(Testimony of Joe May.)

judgment of said Landgericht to the Kammergericht.

"That on July 27, 1932, said Kammergericht, or court of appellate jurisdiction, rendered its decision" * * *

Then you recite that a dispute arose between the liquidator of the May Film Corporation and its president as to who was the owner, and started the institution of the so-called declaratory action. Then you recite the assignment; you recite the guaranty of Fritz Mandl; you recite the rates. In other words, all you are relying on is not upon facts, but upon facts as transmuted into form of judgments, the ownership of which you claim to be in plaintiff, and which you seek, under the doctrine of comity and under the law, to have enforced by this court.

Mr. Blum: The defendant comes in and says, "We are not bound by it."

The Court: They have not denied the judgment. They merely say, "You are relying on this judgment. We attack it [357] on two grounds. In the first place, it doesn't have the breadth which you claim for it and, second, we weren't parties to it and, therefore, under German law, we are not bound by it." You cannot start in and say, "All right; we will try to litigate the facts." That is a different lawsuit.

Mr. Blum: This judgment is not the basis of the cause of action on which this action is brought.

(Testimony of Joe May.)

This judgment is part of plaintiffs' chain of title, which they say, "We are not bound by."

The Court: You are suing on a foreign judgment.

Mr. Blum: But the foreign judgment in the case of May Film Corporation versus Universal; not the Bank for Foreign Commerce versus May Film Corporation in liquidation.

The Court: Well, both of them. The other is part of your chain of title, because if you disregard the foreign judgment, your declaratory judgment, then the plaintiff has no title. Your only derivation of title is through that second judgment, and you have pleaded it yourself.

Mr. Hirschfeld: May we have a few moments, your Honor?

The Court: Yes. Gentlemen, if you desire time to consult, I can call a recess, but it seems to me it is a matter of evidence that can be determined by the California law. However, if you desire to consult with your experts on foreign law, I will declare a recess.

Mr. Hirschfeld: We would appreciate that, your Honor.

The Court: Very well. The particular objection will be [358] sustained.

(Recess)

The Court: Proceed, gentlemen.

Q. By Mr. Blum: Mr. May, do you know how much Fritz Mandl owed the Bank for Foreign Commerce?

(Testimony of Joe May.)

A. Sixty-four thousand, two hundred and some—I don't know exactly.

Q. By Mr. Blum: Marks?

A. Marks. [359]

Q. Reichmarks? A. Yes.

Q. I show you a document which is Plaintiffs' Exhibit 5, containing a copy of an assignment, and I will ask you if you recognize that as a copy of a document that you signed. A. Yes.

Q. You signed the original of the document?

A. Yes.

Mr. Hirschfeld: Referring to what?

Mr. Blum: Plaintiff's Exhibit 5.

The Court: That is the notice?

Mr. Blum: It is the assignment in the notice.

The Court: The assignment contained in the notice of February 12, 1936.

Mr. Blum: Yes. That assignment was, in fact, given to the Bank for Foreign Commerce.

Q. When you went to the Bank for Foreign Commerce to obtain a loan for the May Film Company tell us what transpired at that time?

Mr. Selvin: Just a moment. We object to that on the ground that there is no foundation laid to show that it is binding on the defendant; upon the further ground that it isn't proper rebuttal.

Mr. Blum: It is to show in more detail the transactions and documents that were made at the bank. It may not be exactly rebuttal, but if it is not, we ask leave of Court to reopen plaintiffs'

(Testimony of Joe May.)

case in chief [360] to show that in more detail. Mr. Mandl and Mr. Lenk have, in some detail, explained it, but we would like to show what this witness knows about it, also, to enlighten the Court on the transaction.

The Court: Objection sustained.

Mr. Blum: I would like to make an offer of proof of what we want to prove in this respect, your Honor.

The Court: It is quite evident what you want to prove, but if you want to put it in the record, go ahead and dictate it to the reporter.

Mr. Blum: We intend to prove by this witness that the May Film Corporation went to the Bank for Foreign Commerce and obtained a loan in a revolving credit up to 100,000 Reichmarks; that at the same time the bank did not consider it a satisfactory risk to make the loan to the May Film Corporation and requested that there be certain other additional security given, and requested that Mr. May, Mr. Aussenberg and Mrs. May sign documents to guarantee that in the event the May Film Corporation refused to pay or failed to pay the obligation that they would pay the same; that in addition to that the Bank for Foreign Commerce required certain security to back up the guarantee of Mr. May, and in that regard Mr. May assigned to the bank the claim, and later the judgment in the case of May Film Corporation versus

(Testimony of Joe May.)

Universal, at which time he claimed to be and was the owner of the judgment; and deposited, in addition thereto, certain other securities; [361] that in addition to that the bank required additional security and required Fritz Mandl to guarantee that in the event the May Film Corporation refused to pay or failed to pay and in the event Joe May failed to pay the obligation of the May Film Corporation, then he would pay the same; and to secure his obligation there was deposited in the Bank for Foreign Commerce a special account consisting, first, of American dollars, later transmuted into French francs, and remained on deposit until the May Film Corporation and Joe May and all others defaulted in the payment, after which the Bank for Foreign Commerce took the money out of the account and satisfied itself to the extent of sixty-four thousand some odd Reichmarks, and thereupon transferred all the security to Mandl.

Mr. Selvin: I make the same objection to the offer of proof.

The Court: Insofar as May is concerned, it is already in the record and not proper cross examination. And the portion that is not already in the record is immaterial and an attempt to vary and add to the contents of the so-called assignment contained in the judgment. Objection sustained on that ground. [362]

HEINZ PINNER

called as a witness by and in behalf of plaintiffs in rebuttal, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. By Mr. Hirschfeld: Dr. Pinner, what was your business or occupation in Germany?

A. I was attorney-at-law in Germany for more than sixteen years. I studied law from 1911 to 1914 in Berlin. Just before the war in 1914 I passed the first law examination in Germany, the so-called Referendar examination.

From 1919 to 1922 I did postgraduate work in Germany. I got the degree of Doctor of Law in 1919, and after the second trade examination I was admitted to the bar in Berlin in 1922. I entered the law firm known as Kempner, Pinner and Schmidt, which was one of the outstanding law firms of Berlin, founded by Mr. Kempner, who was a counsellor of justice, and my father, who was also a counsellor of jus- [363] tice in Germany. I was in this firm from 1922 to 1938. I specialized in trade law. I was a law and legal adviser of many banks and some joint stock banks and some mortgage banks. I was a permanent member of several boards of directors in Germany; was legal adviser for large concerns. My office was the adviser of many American firms; especially my partner, Mr. Kempner, was adviser of the Stillhalte creditors, American bank creditors who have blocks of marks in Germany;

(Testimony of Heinz Pinner.)

and he is still doing this job. Besides my practical business as a lawyer I did scientific work; wrote books; law books; and wrote numerous essays in well-known periodicals. I was shortly, after I became a member of the bar in Berlin, I was collaborator, on the side of my father, in the Commentary on the Trade and Corporation Law in Germany, called the Staub-Pinner Commentary. And after this I became his successor. So I think I have some experience in law, especially corporation matters. As to the Bank for Foreign Commerce, this bank was organized and founded in my office—better say in my father's and my office. I was legal adviser of this bank for the whole time that I was attorney-at-law in Germany, and I only stopped to be a legal adviser when I stopped to be a lawyer in Germany.

Q. By Mr. Hirschfeld: When?

A. When I stopped? On the 30th of November, 1938.

Q. Doctor, I want to show you a photostatic copy of a document in this case, known as Plaintiffs' Exhibit 3. I [364] would like you to look at it and see if it is familiar to you in any way.

A. This seems to be familiar to me.

Q. In what way?

A. This is the complaint made by me and brought into court on the 30th of May 1934 on be-

(Testimony of Heinz Pinner.)

half of the Bank for Foreign Commerce against the May Film Corporation.

Q. On the first page there is the name, "Dr. Heinz Pinner." A. That is me.

Q. Is that yourself?

A. That is me.

Q. By Mr. Hirschfeld: Dr. Pinner, in order to present this case to the Court and to handle the case, did you make any special study of the law involving the issues in this case?

A. Surely I did.

Q. And was one of the issues in this case the effect of certain papers, as to whether it was or was not an assign- [365] ment?

A. That is correct. And again, as I told you already, I was very familiar with the Bank for Foreign Commerce and I saw those people, especially Mr. Lenk, twice, three times, four times a week.

A. Well, I had to examine the documents given to me by the bank and I was of the opinion, and am still of the opinion, that there was an assignment and that the action, that I got the order to bring into court, was a good action, and my opinion was right, because the German judge decided that I was right.

Q. By Mr. Hirschfeld: And this point was contested and argued before the court as to the effect of the assignment?

A. Yes. Let me have a look at it.

(Testimony of Heinz Pinner.)

The Court: What was contested can only be determined by what appears on the face of the judgment itself. That is the general rule.

A. I think it says in the judgment that the May Film Corporation contested the assignment, but I will have to look at it. [366]

Q. By Mr. Hirschfeld: Well, Doctor, to make it a little easier and to conform with the court's idea: That is what is called the judgment roll that you have in your hand, is it not; that is the whole judgment roll? A. Yes.

Q. Yes. Is the klage and the answer to the klage a part of the court's records, what they call the judgment roll?

A. That is what we call a part of the court's files, "gerichts akten." I think that may be the same as what you call the judgment roll.

Q. Will you please examine this exhibit that I have just handed to you. In your opinion, and based on the German law and your investigation of the facts and the judgment and the papers you have, was there a valid transfer of the judgment or of the claim of the May Film Corporation to Joe May? [367]

Q. By Mr. Hirschfeld: From the facts as they appear—

A. From the facts I got, from the information I got, and from the complaint, I never had the slightest doubt but that there was a valid assignment. It was one of the best cases I ever had. I was

(Testimony of Heinz Pinner.)

convinced from the first moment that this complaint must be won in the court, because there was a valid assignment, as to my opinion. If that is what you asked me.

Q. Yes. And that opinion was also the German court's opinion?

The Court: The court gave judgment which stated that May Film Corporation did not own, but that Joe May owned the judgment; is that correct?

A. Yes. I got the judgment according to my complaint, favorable to May. [368]

The Court: All right.

Q. By Mr. Hirschfeld: And, also, that the assignment was made to the Bank for Foreign Commerce?

A. Yes; that is included in the judgment.

Q. Doctor, will you please examine Plaintiffs' Exhibit 5 which I now hand you. I want to save a little time. I will direct your attention to just the part I want. You may ignore the translation. You may look at the letter of the Bank for Foreign Commerce. Incidentally, before you answer, is the Bank for Foreign Commerce, whose name appears in this letter, the bank to which you have referred to as being the one you represented and it is the same one in whose name the prosecution——

A. That is the one I referred to when I made the complaint.

Q. Now, will you please examine that letter.

(Testimony of Heinz Pinner.)

A. I have examined the letter.

Q. First, do you recognize the signatures on the letter?

A. Both those signatures are very well known to me. It is one of the directors, Mr. Lenk, and the other one, the so-called Bankprokuristen, Mr. Schlesinger.

Q. In your opinion, as one of the incorporating lawyers of the bank, did those two gentlemen named in there have authority to execute that letter?

A. They have authority to execute all things for the [369] bank: one director and one of the other men.

Q. Will you first direct your attention to the quotation, the quoted part starting with the fifth line of the letter and ending at the bottom where it has typed the word "Joe May," and will you tell the Court, in your opinion, what is the complete legal effect, under the German law, of that paragraph?

A. The complete legal effect of this paragraph is a transaction known in Germany—now, I have the German word "sicherungsuebereignung." I would translate it in English as "the assignment in trust," maybe. That is the so-called "sicherungsuebereignung"—the usual way between banks and their customers for years and years, to give security by transfer of title for debts instead of making only a pledge. Is that understandable.

(Testimony of Heinz Pinner.)

The Court: Yes.

A. There are two ways of giving securities. You can make a pledge, give a mortgage, or something like that; and you can do a little bit more, so that something happens, as a transfer of title. But, in fact, the intention of the parties is only to make a pledge. It appears like a transfer of title, but in fact is a pledge.

Q. Under German law, in the event of a dispute between the parties, is it permissible to show the intent of the parties? [370]

A. As to German law, it is allowed to show that something what appears to be a transfer of title is, in fact, a pledge. But let me add that not in one out of hundreds of cases would there be a discussion, because everybody knows that a paper like this is only a so-called "sicherungsuebereignung" and doesn't intend to be more than a pledge.

The Court: For your information, that is the general principle of American law, too; that a thing which appears to be a transfer absolute of a deed, may be shown to be given as security for a debt, in a proper action, of course. [371]

Q. In the event such a document is used in pledging securities, and the debt is paid off, is there a re-transfer, by operation of law, where it is shown and accepted and known to be a pledge in effect?

A. The question you ask me now is a little more complicated. I will have to make a little bit longer answer.

(Testimony of Heinz Pinner.)

Q. Are you referring to a book there?

The Court: Identify the book. It was written by several persons, including his father.

A. At this time, unfortunately, the only edition I could get here was 1910, which was written by my father, the book which I referred to and which I was a collaborator later on.

Q. By Mr. Hirschfeld: Who wrote the later editions of that book?

A. The later editions of this book was written by several writers, among them I was—it is some time ago but I was a collaborator for the two last editions; but I don't think that is of importance for the moment.

The Court: All right.

A. If there is only a pledge, not a transfer of title, then, as to the German law, I think there will be no doubt. The pledged property goes back after the payment of the debt, by operation of law, and it also passes to a guarantor—is that the word?—to a guarantor, if he pays the debt; the [372] pledged property passes to him, by operation of law. Now, in your case you have no pledged property, but you have property of which the title was transferred, as is so-called “*sicherungsuebereignung*.”

In this case there was always a little bit of dispute in Germany, as it would be, and in this commentary here that I have before me, this refers to a decision of the German Supreme Court who once

(Testimony of Heinz Pinner.)

said, but in a very early decision, that in a case like yours there have to be a transfer and assignment from the creditor to the guarantor. But this decision doesn't say anything applicable for this case. There is the possibility that in pledging something there may be an agreement between the parties as to what will happen after the debt is paid, and especially in cases in which banks are involved. And it is my opinion, as to my knowledge as a legal adviser of many banks, and especially as the legal adviser of the Bank of Foreign Commerce, as to my knowledge, I say it is always the meaning, the intention of the parties, in pledging property in the form that transfers the title, that after payment of the debt there shall be as little formalities as possible. So if, in this case, Mr. May would have paid his debt himself, but the bank would never have made a re-assignment of this assignment, but would have given him back this paper, or perhaps they would have torn it up; but there never would have had to have been a re-assignment, and if they would have asked me, as a legal adviser, if it was [373] necessary, I would have advised them, "You would only have expense and it isn't necessary to do it." Therefore, in a case like yours, Mr. Mandl pays a debt of Mr. May, there is no doubt that Mr. Mandl has a right to get the claim the Bank for Foreign Commerce held at this time as security. If I understand your question in the right way, your

(Testimony of Heinz Pinner.)

question was if there was necessary a special assignment, or if this transfer from the Bank for Foreign Commerce to Mr. Mandl was by operation of law. Well, in this particular case, particularly only as it involves the bank, in my opinion there wasn't necessary an assignment; but I would have to add, the letter you showed me just now stands as an assignment, although it is superfluous as an assignment.

Q. Briefly, you say, in the case of the bank there was an assignment by operation of law?

A. Yes, because of the intention of the parties from the beginning.

Q. Yes. But notwithstanding that, according to this letter you say this is an assignment?

A. On the end of this letter.

Q. I want to get your complete opinion as to the legal effect of the words in this letter. Directing your attention particularly to the kind of words that are used and their legal effect, will you explain if it is necessary to say, "I assign to you" in order to make a German assignment?

A. Well, this question is to be answered as a plain no. [374] I think it is the same as the American law. The German judge never looks for the words; he looks to the facts. And instead of using the words, "I assign to you," "I give to you," "I transfer to you," I do whatever it indicates and the transfer would be enough. Dr. Lenk, who has writ-

(Testimony of Heinz Pinner.)

ten this letter—who is shown at the bottom of the letter—he was a jurist, too. I think he was a jurist in Czechoslovakia, but I don't know. This Dr. Lenk was of the opinion that an assignment was unnecessary. He refers to the paragraph 774 of the B. G. B. And this paragraph says, with other paragraphs referred to in this paragraph that the securities pass to the payor by operation of law. Apparently Mr. Lenk was of the opinion, and wrote a letter that this claim now has passed to Mr. Mandl. But in case Mr. Lenk was wrong and there should have been an assignment, then it is my opinion that as to German law a German judge would have said that this letter, then, is to be considered as an assignment, because it was the intention of Dr. Lenk to give with this letter the full right of title to Mr. Mandl. And we have a paragraph in Germany in the B. G. B., which may be in paragraph 157, but it may be a mistake on my part, because I haven't seen it for a long time, where it says, as to German law, we don't have to look for words, but only for the intention of the parties.

The Court: Which word do you consider effective to constitute an assignment, other than by operation of law?

A. The statement that the claim has been transferred by [375] means of operation of law, and the other, "You will only be liberated free from your debts when you pay to Mr. Mandl and nobody else."

(Testimony of Heinz Pinner.)

The Court: Which of those phrases do you think could be interpreted as being an actual assignment, as distinguished from an assignment by operation of law?

A. The intent of those last two sentences would be considered from the intention of the parties, an assignment, just from the German law standpoint.

The Court: In other words, your view is that it shows an intent to vest title, even though it isn't, technically speaking, an actual assignment; is that correct?

A. Yes. You must realize that this man who wrote this letter was of the opinion that, "I don't need an assignment." But in my opinion, as to the German law, it is clear, that it is an assignment.

Q. By Mr. Hirschfeld: Even though he didn't say it in express words, it is clear that "It is now yours" and, therefore, it is an assignment?

A. It is not necessary to use the word "assign" at all in Germany. The words, "I assign," "I give you," "It is now yours," is sufficient. [376]

Q. Will you look at 133?

A. Yes. I must confess that 133 is a better one.

Q. Will you please tell the Court what that law is?

A. 133 says, if you have to judge about a declaration of a party, you have to look for the real intent of the parties and have not to look at the words. I think that is how you would say it.

The Court: It is very good colloquial American, I will say that.

(Testimony of Heinz Pinner.)

Q. By Mr. Hirschfeld: Here is a translation in English. You can look at it just to see if any of those words would help you.

A. "Without regard to the literal meaning of the expression."

Yes, that is better English.

Q. By Mr. Hirschfeld: And this book you are looking at is the German Civil Code?

A. Yes, the so-called B. G. B. May I add something to the last answer?

The Court: Yes.

A. That is what I told you, about the possibility that there could be a party agreement to get back the securities without doing any act after payment of the debt. It says in this commentary, to which I referred before. It says that it is construed as a deserving condition—if you [377] know what I mean by this. If I say to you, "I give you this paper, but under the condition that you will give it back to me tomorrow," I give you under a deserving condition that you give it back to me tomorrow. Then, you have to give it back, with no other act, tomorrow. There is nothing else necessary. That is what this commentary here says. That is the intention. The property is given to the Bank for Foreign Commerce with the condition that it will come back by itself when the debt is paid; not by operation of law, but as a consequence of that condition entered into by the parties to the first act. Have I made myself clear?

(Testimony of Heinz Pinner.)

Q. Yes, you have made yourself clear. Is that the customary commercial usage of banks in Germany? A. Yes.

Q. And is that the customary commercial usage of the Bank fuer Auswaertigen Handel?

A. I can't remember a single case in which there was a dispute of this kind between the Bank fuer Auswaertigen Handel and some of our customers.

Q. I now show you a page marked 6 of plaintiffs' Exhibit 3, which is entitled on the top "As-schrift"— A. Copy.

Q. —which, for purposes of identification and for counsel's benefit, is the balance sheet. I would like you to examine this balance sheet, please.

A. I know this balance sheet. It was part of my com- [378] plaint.

Q. Yes. A. Added to the complaint.

Q. By taking a piece of paper and putting it on the balance sheet, underneath the line where the word "45.000.—Aktien Kapital" appears, I ask you if that line in fact is not misplaced and should be dropped down one space, as to the 45.000., for the purpose to go opposite the word "Bankguthaben"?

Mr. Hirschfeld: I have in mind this, your Honor: Dr. Golm testified that there was nothing here to show that there was 45,000 marks in the bank. And we are told that by putting this over in this column, adding it to the 60 and 94, it makes it 200.000; and that this should have 200.000 written over here, so that that would make this 200.000, and that is cash in the bank.

(Testimony of Heinz Pinner.)

The Witness: Well, it must be right, because it is a [379] photostat, but there is no doubt—I see it, now. I didn't see it for a long time. There is no doubt it is a misplacement, because I know from my memory——

The Court: No, you can't go on that.

Q. By Mr. Hirschfeld: Without your memory, do you know of these things?

A. I don't have to refer to my memory. The 200,000 here (referring to liabilities) should be no figure at all. That is a mistake. It was admitted before the German courts to be a mistake. That figure is the capital of the company and those 45,000, that is a misplacement. It should be after the word "bank balance." [380]

Q. By Mr. Hirschfeld: According to this balance sheet, does it appear from here that the claim of May Film Corporation against Universal is included as an asset of the company?

A. The claim of either the May Film Corporation or Mr. May against Universal is not in this balance sheet. It is quite clear.

Q. By Mr. Hirschfeld: And if the May Film Corporation still owned the claim against Universal Corporation, under the German law, could it be shown in this balance sheet?

A. There is no difference between the German and American law. [381]

Q. By Mr. Hirschfeld: Is it the law that all assets of a corporation have to be included in a balance sheet?

A. Yes. [382]

(Testimony of Heinz Pinner.)

Afternoon Session

2 o'clock

Direct Examination

(Continued)

Q. By Mr. Hirschfeld: Dr. Pinner, according to German law, where a declaratory judgment, or a judgment such as you have in the case of the Bank against May Film Corporation, may be considered not necessarily binding upon third parties, is this judgment accepted by German courts as evidence of title of the subject matter?

Mr. Selvin: To which question we object on the ground that the German procedure is not applicable to this action, but only the German substantive law.

The Court: I have no objection to having the answer, but I do not think that is the law, because, by the doctrine of conflict of laws, the effect to be given a judgment of a foreign court is determined by the law of the forum and not by the court which rendered the judgment. In other words, it is determined by the law of California, not by the law of the country where it was rendered. However, I have no objection [389] to Dr. Pinner answering the question.

A. Yes; it is evidence of title even if it isn't binding against third persons. Do you want me to explain it?

(Testimony of Heinz Pinner.)

The Court: Then, I take it your answer is, it is not binding against third persons that are not before the court?

A. No; in this case there is no doubt it isn't binding against anybody else but against the May Film, but it is—if I can explain it—evidence of title or proof.

Q. By Mr. Hirschfeld: At the time of this assignment and the letter, was the Bank for Foreign Commerce a member of the Devisen stelle? Maybe I haven't asked it right. Was it a Devisen stelle bank?

A. You mean a Devisen bank. As to my knowledge, and I am sure my memory is good, the Bank for Foreign Commerce belonged to the so-called Devisen bank; is where officially admitted banks to deal in foreign exchange, where there is very strong control.

Q. Under strong control?

A. Under strong control.

Q. Would that letter that you have examined, Exhibit 5—

A. Will you be so kind as to show me Exhibit 5? I don't know which paper it is.

Q. Yes. In your opinion, under German law, would this [390] letter, known as Plaintiffs' Exhibit 5, have been permitted to have been sent out of Germany without the permit of the Devisen stelle?

(Testimony of Heinz Pinner.)

A. In this: There was censorship by the Devisen stelle. Not by the military command, not yet; but by the Devisen stelle.

The Court: Censorship of letters in foreign exchange?

A. Yes. They didn't open all letters, but there was a censor. You didn't know whether your letter would be opened or not.

The Court: But there is nothing in that letter to show that the letter was submitted to the authorities of the Devisen stelle before it had been sent out?

A. If this letter had been opened by authorities of the Devisen stelle, I am quite sure it would have been sent back to Berlin, asking if there was permission to make the transfer, because there was a permit necessary. And if it had been opened on the frontier—— [391]

The Court: There is nothing in the letter itself to show whether it was opened? A. No.

The Court: Of course, the Bank might have had authority and not have taken the trouble, feeling that this letter might not be opened.

A. To my knowledge I know that that is what happened, but there is nothing in this letter about it.

Q. And you notice, that letter bears the stamp of the German notary who notarized it?

A. The signature is notarized, yes.

Q. Would the notary have notarized this letter if the transaction had not been approved by the Devisen stelle? [392]

(Testimony of Heinz Pinner.)

The Court: Counsel is trying to elicit what, in your opinion this might or might not show and how the notary might have acted.

A. Well, a notary in Europe is another thing than in America. I was a notary for many years. I always had the custom to read it, but I know many notaries didn't read it. And if I would have read this, I would have asked my client; but it doesn't say, in this particular case, that it was so.

The Court: All right.

Q. By Mr. Hirschfeld: Are you familiar with Dr. Lenk's signature?

A. That is right. I identified one of his signatures this morning. Here is another one.

Q. By Mr. Hirschfeld: Do you recognize this stationery and the signature? [393]

A. The signature, yes. There is no doubt.

Q. Of whom? A. Of Dr. Lenk.

Q. And it is on the stationery of the Bank for Foreign Commerce? A. Yes.

Q. Would you read it, please?

A. I have read it.

Q. Can you tell from an examination of this document whether or not the consent of the Devisen stelle was necessary or if it was obtained, if necessary?

Mr. Selvin: Just a minute, please. I object to that on the ground that it is hearsay and calls for an interpretation. The letter is a letter from Dr. Lenk addressed to Joe May. There is no founda-

(Testimony of Heinz Pinner.)

tion laid to show that it ever came to the knowledge or attention of the defendant or anyone acting in his behalf.

The Court: On what theory do you think this is admissible?

Mr. Hirschfeld: For this reason, your Honor: There can be ten assignments of a claim without Universal Pictures Corporation knowing a thing about it. These assignments can be by conversation; orally. They would not necessarily have to be a party; they would not have to hear it; they would not [394] have to know anything about it. All that needs to be done is that the last assignee shall inform Universal Pictures Corporation that there have been these assignments, and they cannot object to or claim that they were not assignments simply because they didn't hear the words being said, in cases of oral assignments. Now, I am answering the objection based on the ground that it is hearsay. It isn't hearsay with respect to the claim or details of the claim or how the claim was handled.

The Court: This is the rankest kind of proof. It wouldn't be admissible, in an American court, to read this letter.

Mr. Hirschfeld: I only want the first two lines.

The Court: It is addressed to May and says, "I am very happy to inform you that the authorization of the Devisen stelle has been obtained to transfer to Mandl the claim against May Company. Thereby, Mandl succeeded in all to our rights."

(Testimony of Heinz Pinmer.)

Mr. Hirschfeld: I don't want to introduce the letter. The Court misunderstands my purpose. I did not want to introduce the letter as to anything beyond the first two lines. If counsel wants to use the rest of it, it is up to him.

The Court: It is from Lenk to May, to the effect that the consent of the Board of Control of Exchange has been ob- [395] tained for the transfer of the debt to Mandl. You cannot prove that by a letter written by a witness who is not here to be cross examined. The second part says that he forwards the letter, in German, the notice, and asks that he have it served in New York with the translation. There is no principle of law under which that could be admitted here for any purpose.

The Court: Objection sustained.

Q. By Mr. Hirschfeld: Can you tell us whether, as a matter of common practice, it was customary, in the normal course of business, for the Bank to obtain consents of the Devisen stelle in those instances where it may be material?

Mr. Selvin: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained. He was merely attorney for the bank; he wasn't on the board of directors. [396]

Q. By Mr. Hirschfeld: Do you know what the common practice of the Bank was, from your contact with it, with respect to permission of the Devisen stelle?

(Testimony of Heinz Pinner.)

Mr. Selvin: I object to that upon the same grounds.

The Court: Objection sustained. You cannot prove a specific act by a common practice. [397]

Cross Examination

By Mr. Selvin:

Q. Doctor, in your testimony with respect to whether or not there had been a transfer, by operation of law, of a claim assigned by way of pledge or by way of security, I think you referred to the fact that in the 10th edition of your father's commentaries was a reference to an early Supreme Court decision on that subject. Can you tell us what the reference to that decision is; that is, in what volume and at what page of the Supreme Court reports it may be found?

A. I think it was the decision in Volume 89.

Q. Of course, Volume 89 was published in 1916, so it must be still some other case.

A. Just a moment.

Q. Here is Volume 89 which I place before you.

A. The decision I meant was 1889; not 1916. It may be you misunderstood me. It is a rather early decision, because this institution of sicherungsuebereignung was rather a young institution at that time. And the jurisdiction over sicherungsuebereignung—concerning sicherungsuebereignung, if my memory is quite correct, was given much later. So that I thought to be right, to consider this decision of 1889, as a rather early one; but, anyhow, that is the decision I meant.

(Testimony of Heinz Pinner.)

Q. I just wanted to be sure that was the one. I [398] understood it to be your testimony, also, as to this letter, which is part of Plaintiff's Exhibit 5, the letter dated February 12, 1936, that, in your opinion, if there was no transfer by law that letter, nevertheless, was by itself sufficient to transfer a claim against Universal from the bank to Mandl?

A. That is my opinion.

Q. Under German law an agreement requires, does it not, a declaration of intention or proposal by one party, communicated to another, and acceptance of that proposal by the other party?

A. A transfer——

Q. I am asking you about an agreement; not about a transfer. I ask you if, under German law, an agreement is not a transaction by which a party makes a declaration of intention or proposal, with respect to a certain transaction, to another party, which the other party accepts?

A. I am not in a position to answer this question in this wide form you ask me, because it may be that some kind [399] of agreement is treated a little bit different than another one. I can't tell you here that every agreement must be a declaration of one side, accepted by the other side. That is the usual way.

Q. And then, as I understood your answer just immediately preceding that, you say a transfer or assignment is not an agreement?

(Testimony of Heinz Pinner.)

Mr. Selvin: I will withdraw the word "assignment."

Q. You say a transfer is not an agreement?

A. That is what I said.

Q. Is an assignment an agreement, under German law?

A. It is very difficult for me to answer that question, because I am not quite familiar with the American expression. If I would use the German word "gegenseitiger vertrag"; so I would declare a transfer or assignment is gegenseitiger vertrag. And if "gegenseitiger vertrag" is in the right way translated in English as an agreement, then I would say there is no agreement. But it is rather difficult for me, without an interpreter, to answer those questions when you use words with which I am not quite familiar.

Q. Is an assignment what in German would be called a "vertrag"? [400]

A. Yes, an einseitiger vertrag; a one-sided vertrag.

The Court: Unilateral? A. Yes.

The Court: Other than bilateral? A. Yes.

Q. By Mr. Selvin: Will you turn to Section 398 of the German Civil Code, if you have one before you? A. I haven't.

Q. Then, I will hand you one. Doesn't that section provide in effect that a claim is assigned by an agreement, between the creditor and the other person, by which the claim is transferred to that

(Testimony of Heinz Pinner.)

other person? I am just asking you if that isn't the substantial effect of what Section 398 provides?

A. 398 says there is a possibility that the claim from a creditor may be transferred to another one by—well, now, I use the word, without knowing whether it is the right translation—by agreement. But you will remember, I just answered your last question that there is a *vertrag*; what I [401] called a unilateral.

The Court: One-sided.

Q. By Mr. Selvin: Will you read Section 398 to yourself, while I read to you a translation which, at the request of Mr. Hirschfeld, has already been read into the record, and state whether or not that isn't a correct translation into English of the effect of Section 398. "A claim may be assigned by the creditor by agreement with another person to the latter. From the conclusion of the agreement the new creditor takes the place of the former creditor."

A. It seems to me to be a correct translation.

Q. But it is your statement, as to the German law, that in such an agreement it isn't necessary that the new creditor or assignee, as we would say, would be any party to that agreement?

A. That is my opinion.

Q. Yes. Then it is your opinion that this letter from the bank, this letter of February 12, 1936, which you [402] have examined, addressed and delivered to Universal Pictures Corporation, but

(Testimony of Heinz Pinner.)

which we will assume, for the purpose of the question, has never been communicated to Mr. Mandl, was in and of itself sufficient to transfer by assignment to Mr. Mandl the claim against Universal?

A. Because I need it for the answer. If you want to ask me if this letter alone, supposing Mr. Mandl didn't get any knowledge, would be sufficient to make an assignment of the claim, you mean?

Q. Yes.

A. I will answer the question with yes, because there is no law which renders any particular form written, or something like that. A transfer can be made orally without any form. And wherever a creditor writes a letter, like he does here, informing the debtor that he has assigned this claim, then I would think that this is an assignment in itself.

Q. Very well, now, in that assignment from May to the bank, which is quoted in this letter, I understood it to be your opinion that on the basis of that quotation alone you would interpret that as an assignment, of the claim referred to in it, to the bank, by way of security or in trust?

A. This quotation contained in the original of Mr. May, of February 9, 1933—— [403]

Q. 1932.

A. 1933 it says here. That is an assignment, because it states in plain words, "I assign with these documents the claim."

Q. I understand it is an assignment, but I understood from your previous testimony that you

(Testimony of Heinz Pinner.)

interpret that assignment as an assignment by way of security, or at least an assignment or transfer in trust?

A. Well, now, I remember what you mean. It was one of the first questions I was asked.

Q. That is right.

A. What I think about it, and I say that because that is a letter written from a debtor of a bank to a bank, it is my opinion that that is a transfer in trust. That is what I said.

Q. Confining yourself for a moment, please, just to the language of the letter which occurs between the word "Die," to which I am pointing, and the word "May," to which I am pointing, and eliminating everything that precedes, eliminate everything that follows it, also eliminate from your mind, please, any knowledge that you may have personally of this transaction; just confine yourself to that language. From that language alone is it your opinion that that is anything but an assignment, to the full extent of that particular claim, to the bank?

[404]

A. If I forget all about the rest, but have only in mind this quotation here, then I would say it is an assignment.

Q. By Mr. Selvin: An assignment to the full extent?

A. I would say it is an assignment.

Q. An assignment and nothing else?

A. And if you would ask me if it was an assignment in full right or for trust, I would tell you that

(Testimony of Heinz Pinner.)

you must tell me the story; it can be both; because it is necessary to see the express words. [405]

Q. Then, on what facts, in addition to the particular assignment, do you base your opinion that it is an assignment or transfer in trust?

A. Because the second line reads as follows: "To our bank was given security for our claim."

Q. Now, you are reading from the second line of the letter itself and not from the assignment; is that right? A. Yes.

Q. That assignment was apparently given or executed on the 9th of February 1933. This letter, from which you have just read that sentence, was apparently written February 12, 1936, which is three years later. A. Yes.

Q. You are interpreting the effect of that 1933 assignment upon the basis not only of its own language, but upon the basis of a statement made three years later.

A. If I received this letter with the quotation in it, that is correct, that I interpret this declaration using the words of a letter written three years later. But if you would have come to me in 1933, before this letter was ever written, and would have asked me what about it, then I would have asked you, "Please be so kind and tell me the story." Then I would have explained to you if it was an assignment with full rights or not.

The Court: As I gather, then, the bank, whose rights would be limited by any qualification of abso-

(Testimony of Heinz Pinner.)

lute assignment, [406] having written this letter three years afterwards and having stated that this was for security, that, of course, would control you in saying it was for security, because the bank admitted it; is that correct?

A. Yes; but I think the custom of the American banks will not be other than the German banks. The German banks like to have as much collateral as possible and, therefore, they don't allow——

The Court: All banks do that.

A. ——they don't allow a declaration that it is only for security. It may be that the inventor of this form here, the form used by the Bank of Foreign Commerce, and were made in my office, were made to protect the bank as much as possible.

Q. By Mr. Selvin: Your idea, in connection with any assignment, was to get an instrument signed by the assignor which would give to the bank, on its face, the fullest possible——

A. On its face, yes.

Q. Take this assignment of Joe May of February 9, 1933, [407] together with the statement of the bank that the assignment was given for security for an obligation which it had against May Film——

A. Yes.

Q. Is it your opinion that that assignment constituted a pledge under the German law, a pledge of that claim?

A. It appears to be in the form of a transfer, of a transfer of title, and in facts material it is a pledge.

(Testimony of Heinz Pinner.)

Q. If it is a pledge under German law, in order to be effective the pledgee would have to notify the debtor of the fact of the pledge, would he not, or one of the parties?

A. That is one of the reasons that the banks never take a pledge, but take a transfer of title.

Q. In order to avoid the necessity of giving a notice to the debtor of the fact of the pledge you take assignment to the title, rather than a pledge?

A. That is one of the reasons.

Q. And if it were really a pledge—I am speaking hypothetically now—if the bank really took a pledge of a claim, what is strictly a pledge under German law, that pledge [408] would be ineffective unless notice to the debtor were given as to the fact of the pledge?

A. This is a hypothetical question. Please allow me not to answer, because I am not sure of the situation.

Q. Suppose you look at Section 1280 of the Civil Code.

A. You can't expect that I know all those sections. Yes, it would be ineffective without notice. That is 1280.

Q. When, under German law, there is a transfer of a thing or a claim, either one, by operation of law; that is, the ownership of that thing or claim passes by operation of law, what you mean when you say that that occurs is that as a result of certain acts there is automatically, and without the require-

(Testimony of Heinz Pinner.)

ment of any express transfer of title, an actual passage of title; isn't that right?

A. That is what is called operation by law.

Q. And that is as distinguished from a transfer of title which takes place by agreement of the parties; is that right? A. That is correct.

Q. When you gave the opinion this morning that there had been a transfer from the bank to Mandl of the title to the claim against Universal, you based that opinion, did you not, on what you considered to be the real intent of the parties, as gathered from the document, the facts and circumstances? [409] A. That is correct.

Q. When you interpret a document or agreement between parties upon the basis of what their real intent is, as shown by the circumstances, and you conclude that their intention was that in a particular situation there should be a real transfer or real vesting of a particular thing or claim, what you are really doing, is it not, is deciding that that was their agreement; while it hadn't been perfectly expressed, nevertheless, that was really the agreement that they made; isn't that right?

A. Yes.

Q. So that when you do make such an interpretation the conclusion you arrive at is not that there has been a transfer by operation of law, but that there has been a transfer by act of the parties?

A. No, that is not my opinion. I don't think

(Testimony of Heinz Pinner.)

I said it this morning. What I said was that the bank or this Mr. Lenk was of the opinion that there was a transfer by operation of law; but if he made a mistake then I made, from the two last sentences of the letter, the conclusion that the things was a transfer intended by the parties, because there can be no doubt that a bank like the Bank for Foreign Commerce would not keep a security one moment longer than it was entitled to.

Q. When you interpret any particular document under German law, for the purpose of discovering the intent of the [410] parties, you determine that intent, do you not, on the basis of the objective evidences of it; that is, on the basis of what the party has said and done, and not on the basis of what, secretly and unknown to the other party, may be in his mind?

A. I didn't get the meaning of that question, because there is—secretly? Let me say this, then you can explain it to me: It is my fault.

Q. It is probably my fault, because I didn't make the question so you understand.

A. Mr. Mandl paid a certain sum to the bank. And it was quite clear, as to German law, that he had to get it some way, either by operation of law or by transferring the security, including this claim. Now, I can't understand what you talk about secret things. There was quite an understanding between Mr. May and Mr. Mandl.

(Testimony of Heinz Pinner.)

The Court: What he wants to know, is that understanding clear to you from the letter, or is it——

A. It is very difficult to forget all about those things. For years I knew all of those people of the bank, like very close friends. I saw them every week, and I know it was one of the correctest banks, and therefore——

Mr. Selvin: I move to strike that last statement of the witness as voluntary and a conclusion.

The Court: That last part may be stricken. I think the first part was responsive to my question.

[411]

Mr. Selvin: Yes, but I think that statement about the bank being the correctest institution in Germany goes a little beyond the issues.

The Court: Yes.

Q. By Mr. Selvin: Suppose a corporation in Germany has a claim which it considers valueless, would it be required, under the law, to put that claim down in its balance sheet?

A. No. [412]

The Court: I am inclined to think that the witness is right; that there would have to be a further service before the agency is established that would sequester a fund that was claimed by others. [419]

Mr. Selvin: In view of your Honor's statement, that is all of our cross examination of this witness.

Redirect Examination

Q. By Mr. Hirschfeld: Dr. Pinner, assuming that under the German law the approval of Mr.

(Testimony of Heinz Pinner.)

Mandl to this assignment was necessary, when would it have to be evidenced and how? Or is there a provision of the German law to the effect that an act done for the benefit of somebody else is presumed to be accepted by him?

The Court: Do you understand the question, Doctor?

A. I don't understand it. I don't know what is meant by the question.

The Court: Break it up.

A. Be so kind to explain a little bit what you are asking me. If there would be necessary consent of Mr. Mandl, at what time Mr. Mandl would have to give his consent?

Q. By Mr. Hirschfeld: That is the first of it. Is there any time he would have to give his consent, assuming he had to make a consent?

A. If it was necessary to give his consent, there would be a provision of law for that consent. Otherwise I would answer this question: He can still give it still today. On the [420] other hand, the German law always provides——

Q. Please, Doctor, don't volunteer. We cannot let you argue the point. I just want your opinion of the law. Assuming, for the sake of a hypothetical question, that a party who owes me is not told that the claim has been assigned one, two, three, or four times, and assume that this party does not pay the claim to anybody, and finally after the No. 4, the fourth man who gets it, notifies the debtor, "I now

(Testimony of Heinz Pinner.)

have this claim;" and assume that in the meantime the debtor has never paid anybody; does this notice or the assignment to the fourth party fail, under German law, because maybe No. 2 and No. 3 assignee never told the debtor about it?

A. The fact that the debtor didn't get notice from the first or second or third assignee, and only got notice from the fourth assignee, doesn't prevent the fourth assignee to ask for the money from the debtor. Is that what you want?

Mr. Hirschfeld: Yes, that is what I want.

[421]

Q. By Mr. Hirschfeld: That is your opinion as to the law in Germany?

A. Yes. There is no doubt. [422]

Mr. Hirschfeld: Universal Pictures Corporation, which, I understand, to be December——

Mr. Selvin: It was dissolved December 31, 1936.

[424]

The Court: All right.

Mr. Hirschfeld: And the other thing, your Honor, is an original letter from myself to Universal Pictures Corporation, together with the reply thereto. And may we consider that the evidence that Mr. Selvin has furnished, as to the date of dissolution, together with this letter, may be introduced under our case in chief? [425]

The Court: We will give back to Mr. Selvin the copy. The two letters, the letter of March 26, 1936, and the answer of April 6, 1936, and the envelope

(Testimony of Heinz Pinner.)

which evidently accompanied Mr. Hirschfeld's letter, may be received as one exhibit.

The Clerk: Plaintiffs' Exhibit 13. [426]

PLAINTIFFS' EXHIBIT No. 13

Law Offices

Ellis L. Hirschfeld

Suite 1215 Bankers Building

629 South Hill Street

Los Angeles

TRinity 4567

March 26, 1936

Universal Pictures Corporation

Rockefeller Center

New York

Universal Pictures Corporation

Universal City, California

Mr. J. Cheever Cowdin

Gentlemen:

This is to advise you that we, the undersigned represent Mr. Fritz Mandl who has instructed us to file this claim with you. Mr. Mandl by proper assignment is the owner of a judgment rendered July 27, 1932 by the Kammergericht (District Court of Appeal in Berlin) No. 25U5849/30, further numbered 74 "O"590/26, which judgment was

(Testimony of Heinz Pinner.)

affirmed by the Reichsgericht (Supreme Court of Germany) on February 3, 1933, No. VII 324/1932. This judgment was rendered in a suit brought by the May Film Aktiengesellschaft against the Universal Pictures Corporation, 730 5th Avenue, New York, represented by the board, President, Carl Laemmle, Vice President, Robert H. Cochrane, Secretary, Helen E. Hughes, Treasurer, E. H. Goldstein.

The judgment ordered the defendants to pay to the plaintiffs 50,000 reichs marks together with interest thereon at the rate of the German Central Bank (Reichsbank) Discount, plus two per cent from July 1, 1926. The claim at the present time, as of March 24, 1936, is 86,816.45 Reichs Marks or approximately \$35,000.00, plus interest on 50,000 marks from said March 24, 1936 at the rate of six per cent per annum until said discount rate is changed.

This claim is being sent to you with instructions that you have it presented or present it yourself in the escrow in which the sale of the defendant's company is being handled. If there is any further information you desire on this matter, kindly communicate with the undersigned. Also kindly wire me at my expense the name of the bank and description of the escrow so that this claim may be properly filed therein.

Very truly yours,

ELLIS I. HIRSCHFELD.

EIH:HM

(Testimony of Heinz Pinner.)

[Envelope, containing the following]:

Law Offices Ellis I. Hirschfeld, Suite 1215 Bankers Building, 629 South Hill Street, Los Angeles.

(Addressed to) Universal Pictures Corporation
Rockefeller Center New York City.

(Stamped) Los Angeles, Calif Mar 27 7:35 PM
1936 Arcade Sta. 1

Universal Pictures Corporation
Rockefeller Center
New York

Willard S. McKay
General Counsel

April 6th, 1936

Ellis I. Hirschfeld, Esq.,
629 South Hill Street,
Los Angeles, Cal.

Re: May Film vs. Universal

Dear Sir:

This will acknowledge receipt of your letter of March 26th. Universal Pictures Corporation has never recognized the validity of the claim which you mention, or of the alleged judgment in support thereof.

Very truly yours,
WILLARD S. McKAY.

[Endorsed]: Filed Sept. 27, 1940.

HANS SCHWARZER

called as a witness on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Hans Schwarzer.

Direct Examination

Q. By Mr. Hirschfeld: Dr. Schwarzer, will you please state your legal experience and experience with juristic matters in Germany.

A. I studied law from 1918 until 1921 at the University of Berlin, Freiburg and Frankfort. In 1921 I passed my first state examination, the so-called Referendar examination. Then I went to a bank in Berlin and worked there until 1925. In 1925 I became a Referendar again. In 1929 I passed my so-called Assessor's, the second state examination. From 1929 until 1930 I was the judge of the court there, the Superior Court in Berlin, and I worked for an attorney. In 1931 I received a license to practice law and I practiced law from 1931 until 1933. In 1932 I got a recommendation from the German government, from the Insurance Commissioner, to liquidate one of the biggest companies in Berlin, and that is what I did until September 1938. Until 1933 I was a partner in a bank, and for ten years I was a member of the Berlin Stock Exchange, also, besides my practice.

Q. Are you familiar with Section 774 of the German Civil [427] Code?

(Testimony of Hans Schwarzer.)

A. Yes, I am.

Q. Are you familiar with the Supreme Court decision in 89 Reichsgericht Reports at page 193?

A. Yes, to some extent I am familiar. I read it yesterday and yesterday I made myself familiar with it, but I don't know it by heart, of course.

Q. I hand you the volume, together with a purported English translation, and I would like you to state to the Court your opinion of a transaction based upon the following hypothetical case, and these names, for the purpose of this hypothetical case, can be considered to be fictitious, for the purpose of the question. Suppose a corporation by the name of the May Film Company A.-G. files a suit against an American corporation doing business in Germany, and in the first instance, in the trial court, receives a judgment to the effect that they are not entitled to any claim; that corporation then appeals the case and after the appellate court has passed upon it a judgment is rendered in favor of the May Film Company for 50,000 marks; and further assume that both parties to the case prosecute an appeal to the Reichsgericht and that in the final court the Kammergericht or the appellate court judgment is affirmed; assume that there is an assignment of this claim from the May Film to Joe May in the form and in the words that are set out in Plaintiffs' Exhibit 5 in the language from the fifth line down from the top, start- [428]

(Testimony of Hans Schwarzer.)

ing with the words, "Die Universal Pictures Corporation New York" and ending with the words "Joe May"——

Mr. Selvin: That isn't an assignment from May Film to Joe May.

Mr. Hirschfeld: Just a minute. I got the wrong one.

Mr. Selvin: You want Plaintiffs' Exhibit 3.

Mr. Hirschfeld: Yes.

Mr. Selvin: Page 181.

Mr. Hirschfeld: Thank you very much.

Q. Just forget what I said, for a moment, about Plaintiffs' Exhibit 5.—in the words as contained on page 3 of the exhibit 3, also marked at the bottom 181; and assume further that Joe May assigns the claim in the words of Plaintiffs' Exhibit 5, that I described to you a moment ago. Assume further that one Fritz Mandl guarantees the obligation that is described and as it appears from the balance of the letter in Plaintiffs' Exhibit 5. Will you examine that to be sure you have them all in mind? Having all these facts in mind and having in mind the provisions of Section 774, will you now give us your opinion of that Supreme Court case and its meaning, insofar as it deals with the problems indicated by these various exhibits and assignments? I want to eliminate all other matters and things of the case.

A. May I ask one question to be sure?

The Court: Yes. [429]

(Testimony of Hans Schwarzer.)

A. This is a question for an examination of the so-called Referendar examination, and I am sure you can get different opinions on it with some different reasons. But let me answer the question as shortly and as well as I can. We have a lot of decisions on "sicherungsuebereignung." The Supreme Court, in one of the early decisions on sicherungsuebereignung—it has become well known and developed in the last ten years; in the last five years more and more; and the Supreme Court always had the opinion that is expressed here in this decision: Will not transfer to the plaintiff a certain kind of shares by operation of law, nor the transfer of the claim. Section 774 Civil Code. However, in the economic effect the transfer of ownership as security and the giving of a pledge are very similar or even coincide. The fiduciary, like the pledgee, is given the right for the purpose of security, only he must not keep it longer than is necessary for [430] this purpose. Now, I can't answer the question with yes or no.

The Court: Go ahead. Nobody is interfering with you.

A. Now, here was your hypothetical case: They were different agreements. As I understand your question in this hypothetical case, Mr. Mandl went to the bank, telling the bank, "I guarantee your claim. I know you have security." And whether they spoke about it or not, as to German law the understanding was, "Insofar as I will have to pay

(Testimony of Hans Schwarzer.)

out of my guarantee—I will have to pay you—you will have to give me what you are holding as security.” They didn’t have to speak about it under German law. If they wouldn’t have spoken about—if this wouldn’t have been the will and intent of the parties, then this would have been a gift either to the bank or to Joe May or to May Company. And, therefore, I don’t care—I mean, if you couldn’t tell me whether they spoke about it or not, the agreement was, “I am under guarantee and in case I will have to pay, I will have to get all securities you have for this claim that I have to guarantee now to pay later.” In this decision the German Supreme Court waives a very strict form for the transfer of a certain kind of shares. You couldn’t transfer these shares without a writing, which is different than we have today. But the German Supreme Court waives this law form, because it said in this decision, “We can’t use 774 directly, but we use it indirectly, and the understanding and intent of the parties was that this shall be [431] transferred, and so it is only a side effect of the agreement.” Now, I heard more about the case. May I go ahead without your question?

The Court: Yes, complete your discussion. You are testifying as an expert and you can give your reasons, if you desire; not beyond the facts, but you may go beyond any law that counsel has called attention to. You can’t go beyond the facts.

A. No, I wouldn’t do that, but I would like to tell the story. You see, in this letter you showed

(Testimony of Hans Schwarzer.)

me of February 12, 1936, the bank informs the main debtor, as the German language calls it—Universal Pictures—they inform them, “We want you to pay to Mr. Mandl.”—I am awful sorry, I have a little bit to argue with Mr. Pinner—I feel in my opinion an agreement is necessary. It wouldn’t be enough if the bank would sign a paper, “We assign to Mandl,” without any knowledge of Mandl, without his consent, without his knowing, without his doing anything; but in this case you have to consider an agreement, because of the things which happened before and considering the things which happened later. An agreement, under German law, means very specifically an offer and an acceptance. But if you care to use an example, a child and a milk-nickel—pardon the example—the child doesn’t have to say, “I accept it,” but takes it. That is a fact of a silent understanding or silent expression. And you have the same in German law in [432] 151. In 155 you have the determination of what is an agreement, and you will find, in 151—no, 152—that an acceptance of an offer is necessary to make an agreement; that this acceptance could be done and could be executed before the offer or after the offer, or you even don’t have to accept the offer. I don’t know whether I can translate it very well, but you have a translation of the German Civil Code, and you find in 151—may I read it in German or shall I read it in English?

A. Maybe I had better read it in English. In 151 you find: “The contract is completed by ac-

(Testimony of Hans Schwarzer.)

ceptance nor need notice of the acceptance have been given to the proponent of the proposition, if according to commercial usage such notice is not expected or if the proponent has waived the same."

And in 152: "If a contract is authenticated judicially"—no, I made a mistake. Not 152. 151.

A. 151. In this hypothetical case, in my opinion the necessary acceptance of Mandl had been given, had been expressed when he signed the guarantee, knowing that there were the securities; and finally, when you showed the letter of Mandl to the Universal, this would be an effect; and, also, if you would consider the bank's letter to the Universal, as [433] an offer to assign, then you have Mandl's acceptance by his letter to the Universal asking for the money. But even if nothing happened, you can construe that by silence—I don't know whether it is possible in English to say "silent expression."

The Court: Implied.

A. Implied. Thank you very much. You have to suppose that acceptance. No need of notice of the acceptance has been given of the acceptance if, according to commercial usage, such notice is not expected, because it is only to his benefit.

The Court: It is implied, then, from the circumstances?

A. From the circumstances. I would say from the circumstances, because of the first agreement.

The Court: The presumption being that he wouldn't waive something to his benefit?

(Testimony of Hans Schwarzer.)

A. That is the first part. And second, he wouldn't waive what is to his benefit; and the third point is the letter. With the letter he didn't have to say, "I accept this offer," but if the assignor writes to the debtor, "Pay to Mr. X,"—to the assignee, and the assignee writes to the debtor, "Now you have to pay to me," then this is an acceptance of the offer by German law.

Q. By Mr. Hirschfeld: If the assignee files a suit, is that an acceptance?

A. He couldn't express his acceptance more expressively. [434] Yes, it is; more than a letter. As we heard this morning, in 133 of the German Civil Code, he wouldn't have to say, "I assign"; he wouldn't have to say, "I accept"; he wouldn't have to say, "I offer." He has to do something which, under common sense and judgment, we have to consider as his intent. A demand by suit is more than a demand by letter, and this would express his acceptance.

Q. You have examined this judgment between the bank and the May Film Corporation?

A. Yes, I have.

Q. Without considering for the moment whether or not that judgment is binding upon third parties, what is its legal effect, in your opinion?

A. As to German law?

Q. Yes.

A. It is. In a German case if the plaintiff would produce such a judgment he would produce more

(Testimony of Hans Schwarzer.)

than an assignment. He would produce an assignment which has been confirmed by a court. In a case it would be evidence.

Q. Not conclusive on the third party, but evidence of an assignment?

A. Not conclusive, of course not, but another party would have to bring certain exact facts and say, "This judgment or this assignment or the contents of this judgment is not legal or not true or not correct or right, because the judgment made a mistake"; or something like that; but we have [435] to prove it. The plaintiff has the advantage that he has the proof, and the other side would have to prove that this is wrong and why, with facts; bringing facts and proof.

Q. Will you examine this exhibit, Plaintiffs' Exhibit 5, and read the lines starting at "Die Universal Pictures Corporation" and ending with the name "Joe May." A. Yes.

Q. In your opinion is that a good transfer of the claim described therein? A. Yes, it is.

Q. Without considering the letter, what goes before it or what goes behind it, will you give us your interpretation of the effect of that?

A. It is a usual assignment as it is customary in Germany to transfer a claim to a bank and—I know what you mean. Let me answer it before——

The Court: It is a usual assignment——

A. It is a correct and usual assignment, and by the German law, without any mistakes or any

(Testimony of Hans Schwarzer.)

wrong things. It is the best assignment which is possible. I mean a correct assignment. I couldn't say more.

Q. By Mr. Hirschfeld: Now, does this assignment vest the title of the claim in the bank, in your opinion, and does this assignment give to the bank the ownership of the claim? [436]

A. Yes, it does, but you have to consider the parties of every agreement, in Germany. It is a difference if two postmen made an agreement, or a bank and customer.

Q. Does it appear from here whether there is a bank involved?

A. Yes. This is the Bank fuer Auswaertigen Handel. You see here, "I assign to the Bank fuer Auswaertigen Handel."

Q. According to your statement is it true, according to German law, that where an assignment is made to a bank it is always viewed with a certain amount of, shall we say either suspicion or knowledge, or an idea that it isn't an absolute, outright sale or transfer, but there is something else to go with it? [437]

A. If this document would come to me, as a German judge in a German court, my first thought would be that this is a security; this is a pledge; this would be *prima facie* evidence, because of the parties involved.

The Court: You would assume that it wasn't a transfer of a claim to the bank, except in connection with some transaction? A. Yes, always.

(Testimony of Hans Schwarzer.)

The Court: But you would have to find out what it was, whether it was a loan, or security for a loan of that person or somebody else; and you would merely assume that some kind of [438] ownership might be defeated later on, depending upon the bank transaction involved?

A. That is correct.

The Court: You couldn't say specifically that it was made as security for this man's loan, or somebody else's loan?

A. No, but I would go so far—if somebody would pretend that this had been a sale on the side of the bank, a sale of the claim, I would go so far that I would have him to prove it—I would want him to prove it, because it is *prima facie* evidence. It is 999 times in a thousand that it has to be a security.

The Court: In conjunction with a banking transaction?

A. Yes.

The Court: But the particular details would have to be supplied by details outside of the instrument itself?

A. Yes. The banks like to get it as clear as possible, so as not to have any strings, because if they get it for a debt of so-and-so, then they would have to prove the debt.

The Court: All right.

Q. By Mr. Hirschfeld: Assume, for the purpose of our discussion now, that an act of some kind

(Testimony of Hans Schwarzer.)

is needed by Mr. Mandl to accept the assignment made, under your interpretation of a bilateral contract; would Plaintiffs' Exhibit 13, in your opinion, meet this requirement for a subsequent ratification, or acceptance, rather, of the assign- [439] ment?

A. Yes, it would, as I told you before and as I answered before, and especially because of the dates. You see, the Bank fuer Auswaertigen Handel wrote to Universal on the 12th of February, and this letter had been written March 26, 1936. So you have not only the possibility, but you have to take both together.

Mr. Hirschfeld: Counsel, of course, will stipulate, will he not, that Willard S. McKay, is general counsel for Universal Pictures Corporation and did have authority to answer the letter of March 26th?

Mr. Selvin: I will stipulate that he was general counsel at that time and that he did have authority at that time. He is no longer general counsel.

Q. Will you please examine the exhibit of the process of the Amtsgericht?

The Court: I think I can save a lot of time right now on this proposition by making this announcement, and I think you will find it would be accepted by any law of any civilized country: The nature of a writ of execution, whether under the Roman law or any other law, is a compulsory writ issued out of a court, the effect of which is to sequester a debt and tie it in the hands of a person, to apply it to a judgment. If the debtor is a bank the bank is com-

(Testimony of Hans Schwarzer.)

pelled to keep out of [440] the funds in its hands, belonging to the judgment debtor, an amount sufficient to cover it. That is the law of every country in the world. If the person upon whom the writ is served does not at the time have anything in his possession, the writ cannot attach anything; it cannot sequester anything. If the person on whom it is served, either because it is a different juristic entity, or even an agency or a subordinate body of another corporation, and does not represent the judgment debtor from whom the money is owing, the attachment catches nothing. Now, here, the debtor which held the money due was a New York corporation, or was a Delaware corporation, wasn't it?

The Court: At the time the Deutsche Universal Film A.-G. was served, it had no authority to accept service for the New York corporation. Therefore, the attachment attached nothing; sequestered nothing. Universal Pictures Corporation could not affect the rights of the attaching creditor by, six months afterwards, telling them, "You represent us in [441] what you did before." So I don't think we need to argue that any further, unless you can show me something that will change my mind. I don't see how you can validate an attachment levied upon a person who was not an agent. [442]

The Witness: I had forgotten to mention about this letter, whether this would be an assignment. I had forgotten to answer that it is very unusual, and I think it is the first time that I ever saw it, even

(Testimony of Hans Schwarzer.)

when I was legal adviser of an insurance company, that a letter with signatures below the letter, and the letter has been notarized in Germany. And this is the usual expression for a bank to assign something, and generally they have to do it in mortgages, and for this reason they sometimes often do it, if they want to express that they want to transfer something, to show it to the outside, to make it so that nobody could attach it. [447]

The Court: Couldn't that explanation also apply to the fact that this was a letter written in Germany, intended as notice to a foreign corporation, and that the attestation was necessary in order that a signature might be verified if it were necessary?

A. No, your Honor. I don't like to argue——

The Court: I am not arguing. I just asked you a question.

A. No. And I don't want to become a lawyer here. But the letter says, "I would like to inform you that 774 applies." That wouldn't be of any value and it wouldn't be necessary to get a notary to have it notarized; but the banks do it showing a legal——

Mr. Selvin: That there is a legal transaction involved. That is what you wanted to explain?

Mr. Hirschfeld: In other words, it is an assignment?

A. Yes, it is an assignment. [448]

DR. H. A. GEBHARDT

called as a witness in rebuttal on behalf of the plaintiffs, having been previously duly sworn, was examined and testified as follows:

Direct Examination

Q. By Mr. Hirschfeld: Dr. Gebhardt, in your position as attorney for the German Consulate, do you have any experience with those rules and regulations of the Devisen stelle? A. I have.

Q. Just tell the court with reference——

Mr. Selvin: May I have the question, please?

Mr. Hirschfeld: It was merely to qualify him.

A. There can't be any transfer, in matters of transfer of assets, either from the United States to Germany or from Germany to the United States. I got the latest rules and regulations and laws of Germany until very recently. They are issued in looseleaf form.

Q. By Mr. Hirschfeld: Were you so familiar with the Devisen stelle rules and regulations in February 1930?

A. I might mention in this connection, your Honor, it was one of the most fertile fields of regulations and rules in Germany. They change almost every few weeks, anyway, so I think I was as familiar as I could be, under the circumstances, being away several thousand miles.

Q. Dr. Gebhardt, please forget, for the purpose of this question, that you know anything about a French franc trans- [449] action in this case, and

(Testimony of Dr. H. A. Gebhardt.)

please ignore completely the fact that there was any deposit or guaranty for the security, but confine your answer to just this particular portion: Do you have an opinion if, under the Devisen stelle laws or other laws applicable thereto, it was necessary in February 1930, or at any time thereafter, to sell or transfer or assign a claim, together with the judgment, to a non-resident of Germany?

A. There isn't any question about it. Under those facts the consent had to be given by the Devisen stelle. The principle being that if anything goes out of Germany there has to be a consent of the Devisen stelle, the same as if something goes into Germany, in foreign exchange, in order that the Reichsbank may know.

Mr. Hirschfeld: Read the question.

(Question read by the reporter.)

A. 1930? Well, I did misunderstand. I understand the question to be 1936.

Mr. Selvin: He said 1930 or at any time thereafter. [450]

Mr. Hirschfeld: Let me rephrase my question, because I complicated it.

Q. First, was it necessary to get the Devisen stelle permit to release French francs for a blocked account, for any purpose, in Germany, where a non-resident was involved?

A. A blocked account?

The Court: That wouldn't be a blocked account. A blocked account would only apply to marks.

(Testimony of Dr. H. A. Gebhardt.)

Mr. Selvin: There is the word "gesperrtes account," which I tried to translate into "blocked account."

The Witness: "Gesperrtes account" is an impounded account.

The Court: All right.

Q. By Mr. Hirschfeld: Is it necessary to get the Devisen stelle permit to release, from a blocked account in Germany, foreign francs or foreign exchange for the use in Germany on behalf of a non-resident? A. Yes, it is.

Q. Is it necessary to get the Devisen stelle permit to simply assign a claim?

Mr. Hirschfeld: To a non-resident.

A. Yes, it is.

Q. By Mr. Hirschfeld: In your experience in the handling of these claims and matters in Germany, can you say [451] whether or not, from your examination of any of the exhibits in this case, such a permit was given in this instance?

A. Well, I don't know of any document, that refers to the permit of the control office, in the files of the action.

The Court: I don't see that there is any other supposition. Any of the rest of it would be a deduction.

The Witness: I have seen some documents referring to it, but I haven't seen them in the files.

Mr. Hirschfeld: At this time I would like to ask Mr. Selvin if he will produce the copy of the permit.

(Testimony of Dr. H. A. Gebhardt.)

Mr. Selvin: I have a copy of it. I don't say that it [452] is the permit. In the letters of the Universal file I find attached to the letters an English translation which purports to be a permit of some sort. Here it is.

The Court: May I look at it. If it isn't material, I will disregard it.

Mr. Selvin: That is all I have. Here is a translation. I think this is the German copy.

Mr. Hirschfeld: I would like to use it, but——

Mr. Selvin: I won't stipulate that it is a correct copy or that it is any such permit.

The Court: You can't do it.

Mr. Hirschfeld: Not unless counsel stipulates. Your Honor, I was surprised at the answer. What I had done, I had divided the thing into two separate independent transactions not connected with each other.

The Court: Go ahead.

Q. By Mr. Hirschfeld: Dr. Gebhardt, assume there was a French franc account involved, or a deposit of French francs which would have required a Devisen stelle permit. Then, after that was given would it be necessary to have another permit to transfer the judgment?

A. In other words, if the French franc account is exchanged for something of equal foreign currency or if, by operation of law, something would pass out of Germany in foreign exchange, the two transactions are absolutely interlinked, so that by

(Testimony of Dr. H. A. Gebhardt.)

accepting a free French franc account for the [453] security, which would be considered in the nature of Devisen going out of Germany, in my opinion it would not require any further permit.

The Court: Because it is all one transaction?

A. As I stated, these rules are very difficult and are changed from time to time. The rules are in force, but different over certain districts, and they are changed from time to time; changed quite frequently by administrative orders; but the principle would be that if something equal is accepted and something equal goes out it would be a part of one transaction.

Mr. Hirschfeld: You may cross examine.

Mr. Selvin: I have no questions.

Mr. Hirschfeld: I was intending, your Honor, at the end of the case, to move to strike that attachment, but in view of your Honor's very complete—

The Court: You don't have to strike it. The effect has been given of what it will be.

Mr. Selvin: Your Honor, I want to renew my offer on Defendant's Exhibit E.

The Court: I think counsel assumed it was already in, because he examined with respect to a date on it. [454]

DEFENDANT'S EXHIBIT E

TRANSLATION OF DECISION OF SUPREME
COURT OF GERMANY, 80 REICHSGE-
RICHT REPORTS, 193.

1. To what extent does a thing transferred to ownership by the debtor or a third person, or a right transferred, inure to the benefit of a surety who satisfies the creditor?

2. Concerning the form required by section 15, paragraph 4 of G.M.B.H. (Act relating to Associations with Limited Liability.)

Second Civil Division. Judgment, Dec. 8, 1916, in the matter G. (plaintiff) vs. C. G. H. (defendant). No. II. 307/16.

I. (First Instance) Superior Court, Bremen.

II. (Second Instance) Court of Appeal, Hamburg.

Defendant H. was the personally liable partner and liquidator of the commandite partnership C. G. H. & Co. in liquidation. This firm owned a considerable claim against the mercantile trader S. Hus, as well as against the limited-liability association 'S. Hus.' As security for this claim shares of limited-liability association S. Hus in the par value of RM 48,000 had been transferred. On the other hand S. Hus and his limited-liability association raised claims against C. G. H. & Co. On Jan. 16, 1912 an agreement set forth in a private written

document was entered into, the contracting parties of which were defendant, for himself and for C. G. H. & Co.; also S. Hus and his limited-liability association; furthermore the M. Bank for Commerce and, finally, plaintiff G. The text of this agreement reads as follows:

“Mr. G herewith assumes the irrevocable obligation to refund to the firm C. G. H. & Co., or its liquidator Mr. H., the amount of RM 11,000 not later than the 20th inst. and he herewith assumes the suretyship as debtor towards the firm C. G. H. & Co. and its liquidator as to the afore-mentioned RM 11,000. The payment shall be on account of the debt of Mr. S. Hus or of his limited-liability association owed to the firm C. G. H. * * * [Translator’s Note: Omissions are in the original decision.]

“The Bank for Commerce puts at the disposal of Mr. G. the afore-mentioned RM 11,000 at the rate of 6% interest per annum, and Mr. G. pledges the following mortgages on real estate. * * *

“Mr. G. is under the obligation to repay the afore-mentioned separate credit amounting to RM 11,000 with the M. bank for Commerce, not later than Dec. 31, 1912.

“With the settlement of this separate account of RM 11,000 with the M. Bank for Commerce all eventual demands and claims of the firm C. G. H. & Co. against Mr. S. Hus and the Hus

limited-liability association are to be considered as extinguished; Mr. S. Hus and the limited-liability association S. Hus, likewise waive in that event all their eventual demands and claims of any kind against the firm C. G. H. & Co. and its liquidator. All the securities which are in the possession of the firm C. G. H. & Co. as security for its claim against S. Hus and the limited-liability association are to be assigned to Mr. G. in the event of the aforementioned settlement. * * *

After the RM 11,000 had been paid by the M. Bank to the defendant and by the plaintiff to the bank, the plaintiff demanded repayment of this sum and interest by the defendant. He asserted that the transaction needed judicial or notarial authentication as provided in section 15, paragraph 4 of the Act Relating To Associations With Limited Liability, because it constituted merely a purchase by plaintiff of the shares transferred to the firm C. G. H. & Co. The defendant denied that anything else occurred other than the assumption of a suretyship.

Both lower courts dismissed the complaint; the appeal for revision also was unsuccessful.

Grounds

The judgment attacked is rested upon the assumption that the agreement dated Jan. 16, 1912 did not require judicial or notarial authentication as provided in section 15, paragraph 4 of the Act Relating to Associations With Limited Liability,

although it stipulated the obligation of assigning to the paying surety the shares which were previously transferred to the creditor as security. This opinion is to be approved of. It is true that the shares of the firm H. were not pledged but the ownership was transferred as security. Considering the nature of the legal relationship created by this transaction, by which the firm acquired the shares absolutely as owner and was only obligated by contract to re-assign the shares, it is not permissible to apply directly sections 401, 412 of the Civil Code. The shares were not transferred to the plaintiff by operation of law, notwithstanding the transfer of the claim. (Sec. 774, Civil Code.) However, in their economic effect a transfer of ownership as security and the giving of a pledge are very similar or even coincide. The fiduciary, like the pledgee, is given the right for the purpose of his security only; he must not keep it longer than is necessary for this purpose. Therefore, having due regard to sections 157, 242, Civil Code, it must be considered without doubt as the will of the contracting parties that the creditor and owner by way of security must transfer the right to the surety from whom he has recovered satisfaction and that the principal debtor consented in advance to such a transfer. Since the obligation to make such transfer constitutes a self-evident consequence of the legal relation, an explicit promise to make the transfer, inserted in the agreement only for purposes of clarity, did not

require the formal authentication provided for in section 15, paragraph 4 of the Act Relating to Associations With Limited Liability. The Supreme Court has uniformly limited this form provision to such cases in which the obligation to make a transfer constituted the essence of the agreement. If the principal aim of the contract is something else, and if said obligation constitutes only a legal incident following from the main purpose of the contract, there is no necessity for a judicial or notarial authentication. (Cf., RGZ. [Translator's Note: Decision of the Supreme Court] Vol. 82, page 354 with supplement.)

Plaintiff also does not dispute these decisions in principle. Yet, he maintains the point of view that the document of the contract has to be interpreted in another way and the appeal for revision complains that the witnesses which were named as evidence for this point were not heard by the court. However, another interpretation could be taken into consideration at the utmost only in so far as it might be possible to assume that there was not a suretyship but an assumption of the debt as a joint debtor. This assumption would not further the matter in any respect. Since in the relation of the joint debtors to each other the debt would, contrary to the rule in section 426, Civil Code, remain the burden of Hus (or his limited-liability association) the result would still be that the transfer of the shares could be demanded as an incident of the assumption

of the debt. The statement of the plaintiff on which statement he bases the alleged violation of the form—namely, that he purchased the shares—does not have anything to do with the question concerning the interpretation. This statement only concerns plaintiff's relations to Hus, which relations are not mentioned in the document. The matter provided for in this document is confined to the intercession from which it ensues that the firm H. must transfer the shares to the plaintiff after having received satisfaction. As to whether or not Hus is then entitled to redeem those shares from the plaintiff or whether plaintiff is entitled to keep them permanently instead of a regress, may have been the subject of an agreement between the two of them. The legal transaction of Jan. 16, 1912 does not contain anything related to this and the validity of its form cannot be doubted because of this relation which is outside of the contract.

[Endorsed]: Filed Sept. 27, 1940.

HANS SCHWARZER

(Recalled)

Cross Examination

Q. By Mr. Selvin: Is there any difference in Germany between the notarial fees for merely acknowledging a signature and one for authenticating an assignment of a claim?

(Testimony of Hans Schwarzer.)

A. I can't answer yes or no, because there is the different conditions. The difference is—just a second. To assign a claim it isn't necessary that the notary have knowledge of the signatures. The fee is different where the notary executed the document than where he only notarized the signatures. That is the difference in the fee.

Q. Do you know what those fees were at the time this document was signed by the notary? Whatever it was, do you happen to know what the fees were, and if you do, can you tell whether that represents a fee for authenticating a document, or a fee for merely notarizing the signature?

A. As I told you before, I don't have to consider it. I don't know the fees by heart.

The Court: Well, just answer the question, whether the size of the fee indicates one or the other?

A. I can't. I would suggest you ask Mr. Pinner, because he was a notary. I wasn't. But please let me explain. The fee would be different if the notary executed and pre- [456] pared this instrument than where he notarized only the signature. This is the difference in the fee.

Q. By Mr. Selvin: Would the nature of the document make any difference?

A. Only insofar as there are some documents which have to be prepared by the notary; and an assignment doesn't have to be prepared by a notary. It doesn't have to be notarized or—

(Testimony of Hans Schwarzer.)

Q. Suppose an assignment is notarized, whether that has to be done or not, would the notary charge the same fee for that as he would for notarizing a signature?

A. The difference would be the same; depending on whether he prepared it or whether—

Q. Is there any requirement that the document bear tax stamps or revenue stamps?

A. There is a requirement that an assignment—I think it is one per mill—one per cent. It is one mark on 100, I think. I am not quite sure. But it isn't a revenue stamp. But that doesn't make the document invalid.

The Court: The revenue stamps are attached? They don't use the French papier timbre?

A. No, they don't use the papier timbre.

Q. By Mr. Selvin: Is there any indication, on this letter of February 20, 1936, that there were any such stamps affixed or attached to it?

A. No; as far as I can see they were not. [457]

Q. There were none of those stamps on that?

A. No.

Mr. Selvin: I would like to say this: When plaintiffs' case in chief was closed, Mr. Hirschfeld said that if there should be a judgment against the defendant it was his idea that the date of the judgment in Germany, that is, the judgment of the Kammergericht, which I think was July 27, 1932, was the proper date for computing its value in dollars. I am willing to accept that suggestion, if that question becomes material.

(Testimony of Hans Schwarzer.)

The Court: What is the date?

Mr. Selvin: July 27, 1932, was the date, I think. Isn't that the date you suggested? [458]

[Endorsed]: Filed Aug. 4, 1942.

[Endorsed]: No. 10014. United States Circuit Court of Appeals for the Ninth Circuit. John Luhring and Margaret Morris, as Joint Tenants, Appellants, vs. Universal Pictures Company, Inc., a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed January 2, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10014

JOHN LUHRING and MARGARET MORRIS,
as Joint Tenants,
Plaintiffs and Appellants,

vs.

UNIVERSAL PICTURES CORPORATION, a
Corporation; and UNIVERSAL PICTURES
COMPANY, INC., a Corporation,
Defendants and Appellees.

STATEMENT OF APPELLANTS' POINTS
RELIED UPON IN APPEAL

To the Defendant and Appellee, Universal Pictures Company, Inc., a Corporation, and to Messrs. Loeb and Loeb and Herman F. Selvin, Esq., Its Counsel:

To the Clerk of the Above Entitled Court:

You and each of you will please take notice that the appellants hereby state the points upon which they intend to rely on this appeal in this action are as follows:

1. That the judgment is contrary to law.
2. That the judgment is contrary to the evidence in the case.
3. That the evidence is insufficient to justify and support the judgment in the case.

4. Errors in law occurring at the trial apparent on the face of the record prejudicial to the appellants and excepted to by said appellants.

5. The trial court erred in refusing to give any evidentiary effect to the declaratory judgment between the Bank for Foreign Commerce and May Film A.G. (Plaintiffs' Exhibits 3 and 4), which adjudged that Joe May and not May Film A. G. was the owner of the claim and judgment sued upon herein, merely because defendant herein was not a party thereto. Such judgment was admittedly valid, binding, conclusive and final between the parties thereto, the only persons between whom a dispute then existed as to the ownership of the judgment sued upon herein, and therefore was entitled to receive and should have been given evidentiary effect herein as the foundation of and as a muniment of plaintiffs' chain of title.

6. The trial court erroneously admitted over objection defendants' and appellees' oral opinion evidence based upon hypothetical questions, attempting to collaterally impeach the declaratory judgment between the Bank for Foreign Commerce and May Film A. G. (Plaintiffs' exhibits 3 and 4), which adjudged that Joe May and not May Film A. G. was the owner of the judgment sued upon herein, and that the assignment from Joe May to said Bank was valid, under the claim that the declaratory judgment under German law was erroneous, and therefore did not operate as an adjudication of the ownership of the judgment

sued upon herein between the parties to said judgment. Said declaratory judgment admittedly was valid, binding, conclusive and final between the parties thereto and defendant appellee, a stranger thereto, and not prejudicially affected thereby, could not thus collaterally attack said judgment, which constituted a foundation of and a muniment of plaintiffs' chain of title herein.

7. The trial court, after receiving the opinion evidence based upon hypothetical question as to the force and effect of the said declaratory judgment from the witnesses for the defendant appellee improperly refused to allow and admit proper evidence offered by the plaintiffs-appellants tending to show that in fact there was a sale and assignment of the claim and judgment in question from May Film A. G. to Joe May, and that at said time May Film A. G. had no creditors.

8. The trial court erred in admitting over objection opinion evidence offered on the part of the defendant appellee as to the written law of Germany, in that the written law of a foreign country is only proved by the same or a copy thereof or by the books containing the same, and cannot be proved by the oral opinion testimony of witnesses as to the written law.

9. The trial court erred in holding that there was no assignment from the Bank for Foreign Commerce to Fritz Mandl by operation of law, in that under Section 774 of the German Civil Code, the said claim and judgment was transferred to

Fritz Mandl by operation of law, upon his payment to the said bank of the claim for which the said judgment and claim was given as security.

10. The trial court erred in holding that plaintiffs-appellants could only prove an assignment from the Bank of Foreign Commerce to Fritz Mandl by operation of law when the evidence offered and received showed that there was in addition thereto an actual assignment, and that the issue as to the actual assignment was created by the evidence without any objection on the part of the defendant-appellee. Issues created by the evidence are just as much a part of the case to be determined as issues created by the pleadings.

11. The trial court erred in holding that only the German law was applicable in determining whether there was an assignment from the Bank for Foreign Commerce to Fritz Mandl, in that the written document from the bank to the defendant-appellee dated February 25, 1936, (Plaintiffs' exhibits 5 and 11), was received by defendant-appellee in New York, and its force and effect is to be determined by the law of the place where the same was received, the place wherein the obligations of the defendant-appellee thereunder were fixed, and where the obligation created thereby was to be performed, to wit: New York, and under such circumstances the force and effect of said document as an assignment was to be determined by the law of New York whereunder the document constituted a legal assignment.

12. The trial court erred in holding and finding that under Section 409 of the German Civil Code the aforesaid document, dated February 26, 1936 and the acts in reference thereto did not constitute an actual assignment of the claim and judgment sued upon from the Bank for Foreign Commerce to Fritz Mandl.

13. The trial court erred in holding that since the plaintiffs-appellants did not plead anything but an assignment by operation of law, in respect to the assignment from the Bank for Foreign Commerce to Fritz Mandl, that no other form of assignment could be proved, in that the issue as to an actual assignment was created by the evidence without objection and that under the Federal Rules, of Civil Procedure, great liberality is given in respect to the pleadings in that issues created by the evidence should also be determined so that the case may be tried upon the merits irrespective of the form or sufficiency of the pleadings.

14. The trial court erred in holding that the claim and judgment sued upon were at all times since the rendition of the judgment sued upon the property of May Film A. G., in that under the German law and under and by virtue of *an* final judgment rendered by a German court of competent jurisdiction between the parties thereto, it was conclusively adjudicated in the aforesaid declaratory judgment, as between the two and only claimants as to said claim and judgment sued upon, that the same belonged to Joe May and not to

May Film A. G. and that no competent evidence was offered or received in this cause to overcome such adjudication, and the same could not be collaterally attacked herein.

15. The trial court erred in holding and finding that the judgment sued upon since its rendition has been and now is enforceable only against the defendant-appellee only by the May Film A. G. in that the evidence shows that May Film A. G. no longer was and is the owner of said judgment or claim upon which it is based, and that the same was transferred from May Film A. G. to Joe May, firstly, by purchase and assignment, and most certainly by the aforesaid declaratory judgment and assigned by Joe May to the said Bank for Foreign Commerce and by the Bank for Foreign Commerce to Fritz Mandl and by Fritz Mandl to the Union Bank and Trust Company, and by the Union Bank and Trust Company to the plaintiffs.

16. The trial court erred in holding and finding that under and by virtue of the law of the German Reich the said declaratory judgment had no effect upon the rights of the defendant herein in respect to the claim referred to in the judgment or in respect to the ownership of the claim and was not and is not evidence against either of the defendants herein of any of the facts or issues determined or purported to be determined therein, in that the said declaratory judgment under German law was admittedly binding and conclusive upon the parties thereto and under the law of the State

of California was admissible in evidence as the foundation of or muniment of title on behalf of the plaintiff and appellants and constitutes prima facie evidence on behalf of the plaintiffs-appellants and against the defendants-appellees.

17. The trial court erred in holding and finding that under and by virtue of the law of the German Reich Joe May did not acquire or succeed to the ownership of any part of the judgment sued upon herein or to any part of the claim upon which said judgment was based, in that the aforementioned declaratory judgment admittedly conclusively adjudicated between the May Film A. G. and Joe May and the Bank for Foreign Commerce, the only parties then claiming ownership of or any interest in and to the said judgment and claim, that Joe May and not May Film A. G. was the owner of the claim and judgment sued upon, and that any opinion evidence as to the force and effect of said judgment was inadmissible herein to collaterally attack the said judgment by a stranger thereto, and such judgment constituted prima facie evidence in favor of the said plaintiffs-appellants herein, and could not be and was not overcome by inadmissible opinion evidence.

18. The trial court erred in finding that the facts upon which it was claimed that Joe May acquired the ownership of the said judgment sued upon were insufficient under German law to transfer or vest the ownership of the judgment and claim upon which it was based in Joe May, in that

such finding was and is based upon incompetent opinion evidence and is in direct contradiction to the aforesaid declaratory judgment adjudicating between the two claimants to said judgment sued upon herein that Joe May was the owner thereof and not May Film A. G., and such evidence constitutes a collateral attack upon the said declaratory judgment by a stranger thereto with no rights prejudicially affected thereby.

19. The trial court erred in holding and finding that the Kammergericht found that the claim which is the foundation of the judgment sued upon herein was not transferred to or acquired by Joe May, and that such finding was and is conclusive determination of that issue as between Universal Pictures and its successors, and the May Film A. G. and its successors on the other hand, in that the said Kammergericht did not in fact find that Joe May was not the owner of the said claim and that the only issue between the parties to said action, to wit: May Film A. G. and Universal, and the only finding made by the said Court in that respect was upon the issue as to whether May Film A. G. was the proper party plaintiff and that the said decision and judgment of the Kammergericht does not either under the German law or under the law of California constitute an adjudication that May Film A. G. and not Joe May in fact owned the claim, for the reason that the rights between Joe May and May Film A. G. were not adjudicated in the said Kammergericht action, since Joe May and

May Film A. G. were not adverse parties therein, and Universal did not claim ownership in itself and therefore the court could not and did not adjudicate as between May Film A. G. and Joe May the actual ownership of the claim and the rights between May Film A. G. and Joe May as to the ownership could not be litigated in an action wherein Joe May was not a party and particularly wherein Joe May and May Film A. G. were not adverse parties. Furthermore, the statement in the Kammergericht decision upon which the trial court purported to make its finding was and is only dictum to the said decision and even though the trial court may have construed the Kammergericht judgment as determining the ownership of the claim as of July 22, 1932, nevertheless, such a finding could not constitute a conclusive finding as to the ownership of the claim and judgment sued upon herein at any date subsequent thereto, and the declaratory judgment between the two claimants, to wit: May Film A. G. and Joe May, rendered at a subsequent date did and must nullify any finding by the trial court as to the issue of *res adjudicata*, for said declaratory judgment having occurred subsequent to the rendition of the Kammergericht judgment, would be equivalent to an assignment from May Film A. G. to Joe May as of the date of the rendition of the declaratory judgment and such evidence would be *prima facie* evidence in favor of the plaintiffs-appellants herein and against the defendant-appellee herein as to

the ownership of the judgment sued upon and the claim upon which it is based at a date subsequent to the date of the said Kammergericht judgment.

20. The trial court erred in holding and finding that under the laws of the German Reich, none of the transactions between the Bank for Foreign Commerce and Fritz Mandl had the effect of transferring to or vesting in Fritz Mandl the claim and judgment sued upon herein, in that the undisputed facts show that said judgment was assigned to the Bank for Foreign Commerce as security and that Fritz Mandl guaranteed the payment of the claim for which said judgment had been assigned as security and Fritz Mandl having been compelled to and did pay the claim for which the judgment was given as security, under the German law was entitled to receive by operation of law an assignment of the security as well as the debt which he was required to pay, and the defendant having offered no evidence showing that the facts which constituted the basis of the assignment to Fritz Mandl of said judgment sued upon, in fact did not exist, the finding of the trial court to the contrary is erroneous and contrary to law and to the evidence.

21. The trial court erred in refusing to permit the plaintiffs-appellants from introducing competent evidence to show the existence of the facts which gave rise to the assignment of the judgment sued upon herein from the Bank of Foreign Commerce to Fritz Mandl.

22. The trial court erred in finding that the facts as a result of which it is claimed that Fritz Mandl acquired or succeeded to the judgment or claim sued upon herein did not have the effect under German law of transferring to or vesting in Fritz Mandl any part of the right, title or interest of the said Bank of Foreign Commerce in and to the said judgment and claim, in that under the law of the German Reich, particularly Section 774 of the German Civil Code, such facts were sufficient to transfer the claim and judgment sued upon in its entirety to Fritz Mandl.

23. The evidence herein is insufficient to justify or support the judgment rendered herein, and in fact is contrary thereto, in the following particulars:

(a) That there is no evidence proving or tending to prove that that portion of Finding of Fact No. III to the effect that under and by virtue of the law of the German Reich, said judgment and the claim on which it was based, were at all times since and have remained the property of May Film A. G. and in the German Reich and by virtue of the law of that country, said judgment at all times since its rendition has been and now is enforceable against the judgment debtor, or its successors, only by the May Film A. G., the judgment creditors, in that: the evidence in this action shows that under and by virtue of the aforementioned declaratory judgment, the judgment sued upon and the claim upon which it is

based, belonged to Joe May and not to May Film A. G., and the opinion testimony of the defendants-appellees' witnesses based upon hypothetical questions, was incompetent to impeach said judgment, and the same does not constitute any evidence upon which the aforementioned Finding can be supported, and the aforementioned Finding is in fact, contrary to the evidence in this case. Furthermore the evidence shows that under the law of Germany, the aforementioned declaratory judgment was valid, binding and conclusive upon the parties thereto, and under such German law and judgment, the judgment and claim in question belonged to Joe May and not May Film A. G.

(b) That there is no evidence in this case proving or tending to prove that that portion of Finding No. IV to the effect that under and by virtue of the law of the German Reich, said declaratory judgment had no effect upon the rights of the defendant in respect to the claim referred to in said judgment, or in respect to the ownership of said claim, and was and is not evidence as against the defendant herein, or any of the facts of issues determined or purported to be determined therein, in that, the purported evidence attempting to support such a find is incompetent opinion evidence attempting to show that the said judgment was erroneous as a matter of law, notwithstanding that the judgment admittedly was binding, conclusive and final as between the parties thereto, and since as the evidence shows that the defendant appellee

herein at no time claimed ownership to the judgment adverse to the plaintiffs or any of plaintiffs' predecessors, said defendant-appellee could not show that as between the claimants to the ownership of said judgment that the said judgment was erroneous, and that is in effect what the defendant appellee attempted to show by its opinion testimony, and the aforementioned Finding is in fact contrary to the evidence in the case, to wit: the adjudication found in the aforementioned declaratory judgment.

(c) There is no evidence proving or tending to prove Finding No. V, in that, the only purported evidence offered in respect thereto by defendant appellee is opinion evidence based upon hypothetical questions and not upon the facts in the case, and attempts to impeach an admittedly final and conclusive judgment between the parties to the said judgment, to wit: the only claimants as to the ownership of the judgment sued upon and the claim upon which it is based, and since said Finding is contrary to the adjudication found in the declaratory judgment, it is contrary to the evidence in this case.

(d) There is no evidence proving or tending to prove that Finding VI, in that no evidence whatsoever was offered by the defendant appellee to prove or tending to prove that the said judgment of the Kammergericht referred to therein was and is conclusive determination as between Universal Pictures Corporation and its successors on the one

hand and May Film A. G. and its successors on the other hand, as to the ownership of the claim sued upon in said action, and the judgment itself shows that the sole issue determined by the Kammergericht in that respect was that the plaintiff, May Film A. G. was the proper plaintiff and did not go any further, and could and did not affect the ownership of the claim as between the claimant, Joe May and May Film A. G., for Joe May was not a party thereto, and if any way connected with said action, was not an adverse party to May Film A. G., and the evidence further shows that the said Kammergericht judgment was not conclusive and *res adjudicata* as between Joe May and May Film A. G. respecting the ownership of the judgment sued upon and the claim upon which it is based, in that the evidence shows that under the German law and by the aforementioned declaratory judgment, it was determined that the Kammergericht judgment was not *res adjudicata* as to the issue of ownership between May Film A. G. and Joe May, and that in an action wherein their respective rights were adjudicated and wherein Joe May and May Film A. G. were adverse parties, it was conclusively adjudged under German law that Joe May and not May Film A. G. was the owner of said judgment and claim; therefore the aforementioned Finding is also contrary to the evidence.

(c) There is no evidence proving or tending to prove Finding No. VII, in that defendants offered no testimony whatsoever to refute plaintiffs' claims

that the aforementioned claim and judgment was assigned to the Bank for Foreign Commerce as security for a debt of May Film A. G. by its owner, Joe May; that Fritz Mandl became a surety upon said obligation of Joe May and was called upon to and did pay the obligation and that therefore under the German law, Fritz Mandl was entitled to and did succeed to all the rights, including the ownership of the judgment in question, which the evidence showed to be the facts, and the evidence further showed that there was in fact an assignment from the Bank for Foreign Commerce to Fritz Mandl, and that the letter in question constituted an assignment in fact, both under German and under American law; therefore, the aforementioned Finding is also contrary to the evidence in the case. .

24. The said decision and judgment herein is contrary to law in that:

(a) The failure of the trial Court to hold that the aforementioned declaratory judgment constituted evidence in favor of the plaintiff-appellants and against the defendant-appellee is contrary to law, in that under the law of this State, and of Germany, the aforementioned judgment was final, binding and conclusive between the parties thereto and constituted *prima facie* evidence in favor of the plaintiff-appellants and against the defendant-appellee herein in support of the plaintiffs-appellants' foundation or chain of title.

(b) The trial court's failure to hold that under the facts in the case at bar, there was an assign-

ment by operation of law from Bank for Foreign Commerce to Fritz Mandl as provided by the German law, is contrary to law.

(c) The trial court's failure to hold that there was in fact an actual assignment from Bank for Foreign Commerce to Fritz Mandl, is contrary to law, both under the German and American law, including that of the State of New York and California.

(d) The trial court's failure to hold that the Kammergericht judgment was not *res adjudicata* upon the issue of the ownership of the judgment herein and the claim upon which it is based, is contrary to both the German and American law.

(e) The trial court's failure to find that the transaction had between Joe May, Bank for Foreign Commerce and Fritz Mandl, and the judgment sued upon herein or the claim upon which it was based, had the effect of transferring to or vesting in Fritz Mandl the right, title and interest in and to the said judgment or claim sued upon, is contrary to the law of Germany.

(f) The trial court's failure to hold that there was in fact an actual assignment from the Bank for Foreign Commerce to Fritz Mandl is contrary to law, both of the law of Germany and of the United States.

(g) The trial court's holding that the plaintiffs or any of the predecessors in interest, other than May Film A. G., have any right, title or interest in or to the judgment sued upon herein, or in or to the claim upon which said judgment is based, is

contrary to law of both Germany and the United States and of this State.

(h) The trial court's failure to render judgment in favor of the plaintiffs-appellants and against the defendant-appellee is contrary to law.

25. The trial court erred in denying plaintiffs-appellants' motion for new trial on the following grounds:

(a) Errors of law occurring at the trial, apparent upon the face of the record, prejudicial to the plaintiffs and excepted to by said plaintiffs.

(b) Newly discovered and material evidence, discovered since the trial which could not have been obtained and produced on the trial, by the exercise of reasonable diligence.

(c) Accident and surprise which could not have been guarded against by ordinary prudence.

(d) That the judgment and decision is contrary to the evidence.

(e) That the decision and judgment is contrary to law.

(f) That the decision and judgment is unsupported by the evidence.

(g) That the evidence in the case is insufficient to justify the decision and judgment.

Respectfully submitted,

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[Endorsed]: Filed Jul. 21, 1942.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION RELATING TO RECORD
ON APPEAL HEREIN

It is hereby stipulated and agreed, by and between the plaintiffs and appellants John Luhring and Margaret Morris, and the defendants and appellees, Universal Pictures Company, Inc., by and through their respective counsel as follows:

1. That if during the course of this appeal herein, it shall appear that there is any part or portion of the record of this case in the possession of the clerk of the District Court of the United States, Southern District of California, Central Division, which has not been transmitted by the clerk of said District Court to the clerk of the above entitled court, and that the same, or any part thereof is, or shall be, necessary, required, essential or material, for a proper and complete presentation, consideration or determination of this appeal upon the merits, that such record or any part or portions thereof, upon the stipulation of the parties hereto, or upon the request or application of either or both of the parties hereto, in pursuance hereto and without further motion, shall be transmitted forthwith to the clerk of the above entitled court by the clerk of the said District Court, and that the same shall be considered by the above entitled court in connection with the appeal herein, and that a supplemental transcript of record of the same shall be prepared

and printed at the expense of the party requesting the same.

2. That, if during the course of this appeal herein, it shall appear that there is any part or portions of the transcript of record on appeal herein, which has not been designated for printing and which has not been printed herein, and which is or shall be necessary, required, essential or material for a proper and complete presentation, consideration and determination of this appeal upon the merits that such part or portions of the said record may be designated by the party requesting the same, and counter designations in respect thereto may be made by the other party, together with the necessary points relied upon in respect thereto, and that the same shall be considered by the above entitled court in connection with the appeal herein, and a supplemental transcript of record of the same shall be printed herein at the expense of the party requesting such designation.

3. That, if during the course of this appeal it shall appear that the designation of the points relied upon herein are or shall be deemed incomplete, insufficient or incorrect for a proper presentation, consideration and determination of this appeal upon the merits, that the same, or any part thereof, may be amended, supplemented, corrected, changed or completed upon the stipulation of the parties hereto, or upon the application or request of the parties hereto, or either of them, in pursuance hereto, and without further motion, at the expense of the party

requiring the same, and that the same shall be considered by the above entitled court in connection with this appeal.

4. That any and all court rules and statutes to the contrary relating to, or concerning the matters herein contained, are hereby dispensed with and waived.

Dated this 31 day of August, 1942.

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[Endorsed]: Filed Sep. 29, 1942.

No. 10014

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOHN LUHRING and MARGARET MORRIS, as joint tenants,
Plaintiffs and Appellants,
vs.

UNIVERSAL PICTURES COMPANY, INC., a corporation,
Defendant and Appellee.

APPELLANTS' OPENING BRIEF.

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No. 10014

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN LUHRING and MARGARET MORRIS, as joint tenants,
Plaintiffs and Appellants,

vs.

UNIVERSAL PICTURES COMPANY, INC., a corporation,
Defendant and Appellee.

APPELLANTS' OPENING BRIEF.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS OF JURISDICTION.

This action was commenced in the Superior Court of the State of California in and for the County of Los Angeles. Plaintiffs (Appellants) therein sought recovery of \$35,-256.99, plus interest and costs, upon a final German judgment, from Universal Pictures Corporation, a New York corporation, and Universal Pictures Company, Inc., a Delaware corporation (Appellee). [R. pp. 2-9.] The cause, upon application of Appellee, was removed to the United States District Court by order of said Superior Court. The removal petition alleged that Plaintiffs were citizens of California; that Appellee was a Delaware corporation and a citizen of said State; that Defendant, Universal Pictures

Corporation, was a dissolved New York corporation, and that the amount in controversy, exclusive of interest and costs, exceeded \$3,000.00, to-wit: \$35,256.99. [R. pp. 9a-16.] Therefore, said District Court acquired jurisdiction herein under Title 28, Section 71, U. S. C. A. (Jud. Code Sec. 28 amended), Title 28, Section 41, Subsection 1 (Jud. Code, Sec. 24 as amended).

Briefly, the amended complaint* [R. pp. 2-9] alleged that plaintiffs were citizens of California; that Defendant Universal Pictures Corporation was a New York corporation, and that Universal Pictures Company, Inc. was a Delaware corporation [R. p. 2]; that the Superior Court in Berlin, Germany (Landgericht), and the District Court of Appeal in Berlin, Germany (Kammergericht), were courts of record and of general jurisdiction, and that the Supreme Court of Germany (Reichsgericht) was a court of record having appellate jurisdiction, and that all three courts were duly created by the laws of the German Republic. [R. p. 3.]

That on July 27, 1932, Mayfilm Corporation, a German corporation, upon appeal from the Landgericht, recovered a judgment of 50,000 Reichmarks, plus interest and costs, against Universal Pictures Corporation, the New York Corporation, in the Kammergericht, and that this judgment was affirmed by the Reichsgericht and became final [R. pp. 3-5]; that the amount of said judgment transmuted into lawful money of the United States up to January 1, 1937, was \$35,256.99. [R. p. 9.]

*The original complaint, before service thereof, was superseded by an amended complaint, filed as of course while the action was still pending in the State Court.

That a dispute arose between Joe May and the Liquidator of the Mayfilm Corporation over the ownership of said judgment, and in an action between the Bank for Foreign Commerce (assignee of Joe May) and Mayfilm Corporation in liquidation, the Landgericht adjudicated that Joe May and not Mayfilm Corporation was the owner of said judgment, and that the assignment thereof by Joe May to the aforesaid Bank was valid. [R. pp. 5-6.]

That the judgment had previously been assigned to said Bank to secure a loan made by Mayfilm Corporation and guaranteed by Joe May and one Fritz Mandl. That Mandl, as guarantor, paid the debt, and by German law became the owner of the security, *i. e.*, judgment. That notice thereof had been given to the defendant by said Bank. [R. p. 7.]

That Mandl assigned the judgment to the Union Bank & Trust Company of Los Angeles which assigned it to Plaintiffs, and the judgment remains unpaid. [R. p. 8.]

That prior to this action Universal Pictures Corporation was dissolved and its obligations, including the one sued upon, was assumed by Universal Pictures Company, Inc. [R. p. 9.] Plaintiff prayed for judgment of \$35,256.99 plus interest and costs. [R. p. 9.]

Appellee, by amended answer* [R. pp. 17-27] admitted the existence and jurisdiction of the German Courts, but denied that said Courts acquired jurisdiction of Universal Pictures Corporation. It denied, upon lack of information and belief, the other allegations of the complaint, except that it admitted the dissolution of Universal Pictures Corporation and the assumption of its obligations by appel-

*A demurrer to the original answer was sustained in part and was superseded by the amended answer.

lee. Appellee alleged as a further defense that the judgment sued upon had been attached as the property of Mayfilm Corporation by a third person in another action in Germany, and that by reason thereof defendant was prevented from paying said judgment to plaintiffs. Appellee's third defense asserting that as a matter of comity, the Court should not enforce or recognize the German judgment but should inquire into the same upon the merits, was attacked by demurrer which was sustained. [R. p. 29.]

This cause was tried by the District Judge, sitting without a jury, who in a written opinion rendered his decision for Appellee upon the theory that Appellants had not established their ownership to the German judgment. [R. pp. 30-33.] On November 22, 1940, written Findings of Fact and Conclusions of Law and Judgment for Appellee were signed and filed [R. pp. 34-42], and notice thereafter was given to the parties. On December 2, 1940, Appellants served and filed a motion for new trial [R. pp. 42-61], and thereafter the same was duly and seasonably heard [R. pp. 83-89], and on March 3, 1941, the said motion was denied. [R. p. 90.] On May 29, 1941, notice of appeal was filed by Appellants and the appeal herein was perfected. [R. pp. 90-91.]

The United States Circuit Court of Appeals acquired jurisdiction herein by virtue of an appeal having been taken to this Court by Appellants from the judgment of the District Court within three months after the denial of Appellants' motion for new trial, under Title 28, Sec. 225, Subd. (a) First, U. S. C. A. (Jud. Code Sec. 128, amended) and under Title 28, Sec. 230 U. S. C. A., and pursuant to Rule 73 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE.

(A) Statement of the Facts.

Appellants brought an action to enforce a German judgment. At the trial there was no dispute as to its validity, and it was admitted that the judgment was unpaid. The defense that the German courts had not obtained jurisdiction of the judgment debtor, Universal Pictures Corporation was abandoned. [R. p. 104.] The defense of prevention of payment by virtue of a third party attachment was rejected during the trial by the trial court on the ground that the evidence then disclosed that nothing had been sequestered and it would be pointless to take further evidence on that issue. [R. p. 534.] A third defense of comity was not urged, as a demurrer thereto had been sustained thereto before the trial commenced. [R. p. 409.] The primary issue was the ownership of the judgment itself.

In 1926, Mayfilm Corp., a German corporation, brought an action for breach of contract, against the Universal Pictures Corp., a New York corporation, in the "Landgericht," a court in Berlin, comparable to a county Superior Court. March 30, 1930, judgment therein was rendered in favor of the defendant. [Pl. Ex. 2, R. pp. 106-114.] An appeal was taken to the District Court of Appeal, at Berlin, *i. e.*, the "Kammergericht," where on July 27, 1932, the Landgericht judgment was reversed, and an award of 50,000 Reichsmarks, plus interest, was made in favor of the Mayfilm Corp. [Pl. Ex. 2, R. pp. 117-170.] Both sides appealed to the Supreme Court, *i. e.*, "Reichsgericht," and on February 3, 1933, the Kammergericht judgment was affirmed. [Pl. Ex. 2, R. pp. 171-197.]

Subsequent events as hereinafter related, gave rise to further litigation. In 1934, the Bank for Foreign Commerce, a German Bank, hereafter referred to as "Bank," claimed to be the owner of the above judgment against Universal. This claim was disputed by the Mayfilm Corporation, by its Liquidator. May 30, 1934, the Bank commenced action against the Mayfilm Corporation, for declaratory relief, in the Landgericht of Berlin, to determine ownership of that judgment. In this declaratory relief action, the judgment roll shows that: (a) August 29, 1930, one Joe May purchased certain assets of the Mayfilm Corp., which assets included among other things, the then defeated cause of action against Universal. (b) That on May 30, 1932, while such original action against Universal was being appealed, but prior to the later Kammergericht judgment against Universal, Joe May assigned said claim to the Bank [Pl. Ex. 4, R. 210-212], and (c) on February 9, 1934, after Kammergericht had rendered its judgment against Universal, May further assigned said Kammergericht judgment to said Bank. [Pl. Ex. 5, R. pp. 245, 246; 482.] (d) That Joe May had since August 29, 1930, carried on the litigation of the claim against Universal in the corporate name of Mayfilm Corp. "as a matter of form," personally advanced all costs, "gave information," through the Kammergericht and the Reichsgericht [Pl. Ex. 4, R. pp. 229, 230]; (e) That Joe May deposited a copy of the assignment of May 30, 1932, with the clerk of the Court. [Pl. Ex. 4, R. pp. 210-212.]

This action for declaratory relief resulted in a final decree on February 11, 1935, by the Landgericht, in favor of the Bank, adjudicating that the judgment against Uni-

versal was the property of Joe May personally, was not the property of Mayfilm Corp. and that the assignment thereof by May to the Bank was valid. [Pl. Ex. 4, R. pp. 226, 227.]

Said Declaratory Judgment of the Landgericht will hereinafter be referred to as “Decree” and the original judgment against Universal sued upon will herinafter be referred to as “judgment.”

Further, regarding the assignment of the 50,000 Reichsmarks judgment by May to the Bank, in the trial of the action at bar, it was shown that said assignment was “by way of security” for an obligation due to the Bank, and that in addition thereto said Joe May and one Fritz Mandl became personal guarantors of the obligation. [R. pp. 264, 280.]

Subsequently Fritz Mandl was required to, and did pay the aforesaid obligation to the Bank [R. pp. 263, 280], and thereby became entitled to said security, to-wit: the judgment. Mandl’s “right” to receive said security was not questioned by appellees. Appellants introduced evidence, oral and documentary of a *written assignment* of the judgment by the Bank to Mandl [R. pp. 264, 270, Pl. Ex. 11; R. pp. 295-7, Pl. Ex. 5; R. pp. 246-7], as well as facts disclosing an assignment by operation of law.

Further, under date of February 12, 1936, said Bank, in writing, notified the Judgment Debtor, Universal Pictures Corp. that Mandl had paid the principal obligation, that the judgment against Universal “has been transferred to . . . Mandl” and that Universal can satisfy this debt only by payment to Mandl. [Pl. Ex. 11, R. pp. 295, 297;

Pl. Ex. 5, R. pp. 246, 247.] On April 29, 1936, Mandl assigned said judgment to the Union Bank and Trust Co. of Los Angeles [Pl. Ex. 6, R. pp. 254, 256], and on January 16, 1937, said Union Bank assigned the judgment to appellants. [Pl. Ex. 8, R. pp. 258, 259.] Appellees do not question the last two assignments.

There was agreement between the parties at the trial, that the value of German Marks in American Dollars, and the computation of interest from 1926 on the judgment (2% over Reichsbank Discount Rates) could be ascertained from a local bank expert in foreign exchange. Accordingly the principal was computed at \$11,862.50, and the interest to date of trial, September 24, 1940, was determined to be \$12,472.26. [R. pp. 301-5, Pl. Ex. 2; R. pp. 120, 303, 549.]

Appellees admitted that Universal Pictures Corporation, the original judgment debtor had been dissolved, and the present appellee, Universal Pictures Company, Inc., had assumed and agreed to pay the former's obligations subject to all proper defenses or set-offs. [R. p. 20.] Because of this admission, both companies will be hereinafter referred to by the singular word "Universal."

Appellees attacked Appellants' title by advancing the following theories: 1. That the declaratory decree should be ignored because (a) that said decree, though final, was erroneous (appellants' procedure in this respect was to elicit answers from experts to hypothetical questions concerning German law. Appellants made timely objections.) (b) That said decree, even if not erroneous, did not affect the judgment debtor (Universal) because the latter was

not a party to that action, and therefore said decree was of no evidentiary value herein; (c) that the said decree was in conflict with a portion of the “grounds for decision” in the original Kammergericht Judgment. 2. Appellees, though conceding that Mandl had a “right” to receive the judgment against Universal from the Bank, when he had paid them, contended that neither the transactions had, nor the notice given by the Bank to Universal, nor the operation of German law, nor the evidence introduced of an assignment were sufficient, either individually or collectively, to consummate the formal assignment which appellees insisted was necessary under German law.

(B) Questions Involved.

1. Is the judgment herein contrary to law?

This involves a consideration of whether the trial court correctly applied the proper law to the facts.

2. Is the judgment herein contrary to the evidence?

This involves a consideration of all the evidence in the printed record.

3. Is the judgment supported by the evidence?

This involves a consideration of all the evidence in the printed record.

4. Are the findings of fact supported by the evidence?

This involves a consideration of all the evidence in the printed record.

5. Did the Court err in determining that the Appellants failed to establish their ownership of the judgment sued upon?

This involves a consideration of the evidence and whether the correct law was properly applied.

6. Did the Court err in permitting, over Appellants' objections, the introduction of oral expert opinion evidence tending to collaterally impeach the final German declaratory decree, upon the theory (Appellees') that such decree was *erroneous* under German law?

This involves a consideration of the ruling upon the objection made to the testimony given by appellees' witnesses.

7. In determining the issue of Appellants' ownership of the judgment, did the Court err in holding that the final German decree was of "no evidentiary value" whatsoever because the Judgment Debtor was not a party thereto, where said decree adjudicated the ownership of the said judgment between the only claimants thereto and Appellants derived their title from and through the successful claimant?

This involves a consideration of the findings, the evidence and the law.

8. Did the trial court err in holding that that portion of the Kammergericht judgments designated therein as "Grounds for Decision" was *res adjudicata* on the issue of ownership of said judgment as between the *parties hereto* and that therefore the subsequent declaratory decree should be disregarded?

This involves a consideration of the findings, the evidence and the law.

9. Where appellants' pleadings alleged an assignment by operation of German Law, and the evidence introduced included proof of an additional actual assignment and thereby created, without objection, the further issue of such actual assignment, did the Court err in ruling that it

would limit appellants to proof of an assignment by operation of German Law alone, and any other form of assignment would not be considered because of said pleadings?

This involves a consideration of pleadings, the evidence, the law and the Court's ruling thereon.

10. Are certain designated "findings of fact" in the Judgment Roll sufficient, either in form or content, to legally constitute findings of material ultimate facts, or are they naked unsupported conclusions of law?

This involves a consideration of the findings and parts thereof objected to by Appellants.

11. Are the "conclusions of law" supported by the law, or are they contrary thereto?

This involves a consideration of the "Conclusions of Law" and a determination of whether the trial court correctly applied the proper law to the facts.

12. Did the Court err in denying Appellants' motion for a new trial?

This involves a consideration of the evidence, the law, the various rulings of the trial court, the motion for new trial and the affidavits in support of and in opposition thereto.

SPECIFICATIONS OF ERROR.

1. The Court erred in admitting opinions of experts in answer to *hypothetical* questions, for the purpose of showing that an *actual* German Declaratory Decree was *erroneous* according to German Law. Said Decree determined Joe May to be the owner of the Judgment sued upon.

Appellants objected (but were overruled) throughout this entire line of questioning on the following grounds:

(A) "I object to it as incompetent, irrelevant and immaterial. Counsel does not recite the full facts in the question involved here. It also attempts to express an opinion on or reexamine a judgment which has already been rendered in Germany and has become final. It includes facts not in evidence and omits facts that are in evidence. It particularly does not include the fact that the sole director of the corporation consented to the particular transaction involved, to-wit, the sale of certain assets to an individual for a consideration, and that these facts have already been judicially determined by a Court in Germany, and it is an attempt to go behind the judgment ' . . .' and further that it would attempt to impeach a final judgment." [Tr. pp. 318, 319.]

The full substance of the evidence admitted over this objection, was the experts' opinion of the effect of German law *upon the facts disclosed in the declaratory relief action* [Pl. Ex. 3 and 4, R. pp. 204-241] as follows: That although the written agreement (shown in the judgment roll) between Joe May (sole stockholder) and one Aussenberg (purchaser of half of May's stock), whereby the former was to acquire certain corporate assets (including

the claim resulting in judgment sued upon) was consented to by the said corporation and to whom the consideration was paid, said agreement was insufficient *according to German Law* to actually transfer said claim to May; that a formal assignment was necessary for said purposes. [R. pp. 321-325.]

(The above opinion was in direct contradiction to the actual German final decree which held under these facts that Joe May did become the owner of said Judgment, and that said judgment roll disclosed that there had been such actual assignment made. [Pl. Ex. 4, R. pp. 228, 229.]

(B) Appellants further objected and were overruled when the expert was shown the *exact written agreement* in the judgment roll *and the final decree* (adjudging Joe May the owner) and was asked if he had an opinion as to whether that agreement and the facts as shown *in said judgment roll* “would be effective under the law of Germany to transfer or assign to Joe May the claim of Mayfilm against Universal.” The grounds of objection were: “To which we object, if Your Honor please, on the ground that it is incompetent, irrelevant and immaterial. The particular ground that we would like to rely upon here, in addition to the general objection, is that it attempts to go behind a judgment. The documents that have been read are contained within a judgment roll upon which a judgment has been rendered by a Court of competent jurisdiction. The witness is now asked to decide whether or not that judgment of that Court is proper.” [R. p. 334.]

The expert gave his opinion as follows: That the written documents *and facts recited* in the actual judgment roll

were ineffective as a transfer of the judgment to May, *under German Law*; that a formal assignment was necessary. (This opinion evidence likewise attempted to “reverse” that final German decree by attempting to show that the German Court was guilty of judicial error, and further sought to contradict “by a legal opinion” the existence of a fact disclosed in the judgment roll, to-wit, that there was an assignment from the Corporation to May.)

2. The judgment herein is based upon findings of fact, which, in material matters are not sustained by the evidence, and are contrary thereto. Such material findings and the particularities wherein same are erroneous, are as follows:

(A) That portion of Finding No. III [R. p. 36], reading: “Under and by virtue of the law of the German Reich said judgment, and the claim on which it was based, were and at all times since have remained, the property of Mayfilm A. G.; and in the German Reich and by virtue of the law of that country said judgment at all times since its rendition has been and is now enforceable against the judgment debtor, or its successor, only by Mayfilm A. G., the judgment creditor,” is erroneous:

Said portion of the finding is contrary to the evidence. Said evidence consists of: (1) the judgment roll of the judgment sued upon, (2) [Pl. Ex. 2, R. pp. 106-199]; the judgment roll of the declaratory relief action [Pl. Ex. 4, R. pp. 204-241], (3) oral expert opinion testimony.

The judgment roll, relating to the Kammergericht [Pl. Ex. 2] shows: the defendant therein objected that the

plaintiff therein (Mayfilm Corp.) was “not the *proper party*” since the claim was in reality owned by Joe May. [R. p. 127.] That the testimony of Joe May therein was to the effect that he owned the claim, but that the suit thereon was to be “continued” by the plaintiff corporation [R. p. 118] that the Court’s “Grounds of Decision” stated that the plaintiff was the *proper party* [R. p. 128], that it “was assumed” that when liquidation was completed, the proceeds of the judgment should be transferred to May; that *distribution of assets among* “associates” before corporation’s debts were paid would be *invalid*, as to the corporation’s *Liquidator*. Said Kammergericht “Grounds for Decision” however were silent as to a *sale of assets* for a *cash consideration*. That issue was never raised therein. (It should be noted here that when the German Supreme Court denied a revision of the Kammergericht judgment, its decision showed that it considered all the evidence, and in affirming the Kammergericht judgment the Supreme Court declared its own “Grounds of Decision” in which the incidental question of “proper party” or the ownership of the claim was not considered or determined.) [R. pp. 177 to 196.]

The final decree of the Landgericht [Pl. Ex. 4] in the declaratory relief action shows; this decree was rendered February 11, 1935 [R. p. 226], *3 years and 5 months after the rendition of the Kammergericht judgment of July 27, 1932*; that the parties thereto were the Bank for Foreign Commerce as assignee of Joe May, and the Mayfilm Corporation, by its Liquidator [R. p. 205]; that the subject matter of the suit was the ownership of the judgment sued upon herein [R. p. 206]; that the Bank and the

Mayfilm Corporation by its Liquidator each asserted rights of ownership of said judgment [R. p. 207] and that the decree of said Court was that there was a sale and assignment thereof to Joe May by the Mayfilm Corporation [R. pp. 228-9] that Joe May was the owner [R. p. 226]; that the corporation was not the owner of the judgment and therefore Joe May's assignment thereof to the Bank was valid. [R. p. 227.] Said judgment roll in the declaratory action further shows that: June 30, 1930, Mayfilm Corporation had no debts other than to the Bank [R. 208]; it had assets of 113,755.54 R. M.; that August 15, 1930, said corporation became active with assets of 105,004.10 R. M. [R. p. 208]; that at the time Joe May bought the claim said suit was of uncertain value as it had been lost in the first trial [R. p. 209]; that on May 30, 1932, Joe May assigned the claim against Universal to the Bank; that on August 29, 1930 (the date of the purchase of the claim by May from the corporation) there were *no* creditors as per the balance sheet attached thereto* [R. p. 211]; that at the time the Kammergericht held the "transfer of the said claim" to Joe May was subject to the payment of creditors, the Kammergericht failed to go into the question of the existence of creditors, and therefore its remarks thereon are "dicta"; that in its "grounds for decision," said Landgericht adopted and incorporated therein the statement of a witness to the effect that: It was correct that there *was assigned* to Joe May, in accordance with the agreement and said balance sheet, in consideration of the payment of 45,000 R. M.,

*Said balance sheet was discussed by the experts as will appear later.

said claim against Universal [R. pp. 228-229], that only as a matter of form was the lawsuit conducted in the corporation's name [R. p. 229] that Joe May paid all costs of the suit and furnished the information regarding it [R. p. 230]; that proof of the allegations of the complaint has been made. [R. p. 230.]

The oral opinion of the experts for appellees included: an admission that the declaratory decree established that the claim in question was owned by Joe May [R. p. 338]; that it "*created law between the two litigant parties*" (Joe May's assignee, and the Mayfilm Corp. by its Liquidator) and further that said decree "concerns the relationship between the Bank . . . and Mayfilm A. G. (corporation) *and to that extent it establishes that the claim is owned by Joe May. That is the meaning of this judgment*" [R. pp. 339-340]; that said decree is "binding upon these two parties" [R. p. 342]; that from the standpoint of American Law, of *res judicata*, the effect in Germany of a judgment there is that "they bind the persons who are parties and their privies" [R. p. 369]; that regarding the corporation's balance sheet referred to *supra* that it "does not mention the claim against Universal" [R. p. 336]; that if Miss Loewenstein (the director of Mayfilm Corp.) assented to the agreement between May and Aussenberg and further said, "I, as only member of governing body assign the claim to you—Joe May," "this would be a real assignment *and it isn't necessary that it be written.*" That any simple words indicating the intent to assign would be good, *that it isn't necessary to use the word 'assign'.*" [R. pp. 456, 457.] (Note: See testimony of Miss Loewenstein in [Pl. Ex. 4, R. p. 228] *i. e.*,

"Grounds for Decision" in Declaratory Decree action, reciting that "It is correct that there was assigned to . . . Joe May in confirmation with the agreement with . . . Aussenberg and the . . . balance sheet . . . the claim against Universal . . ." See also her testimony therein [R. pp. 236, 7] to same effect. See also recital of same fact of assignment in the Decree under heading of "Facts." [R. p. 227.]) In the position asserted by Mayfilm Corp. in Liquidation, in the Declaratory action, that corporation admitted that there had been a valid assignment of certain assets by the corporation to May, but it was claimed that they did not include the claim against Universal. [R. pp. 215, 216.] The Court's decree was that the claim against Universal *was included* in those assigned assets. One of appellants' experts testified that: On the balance sheet of the Mayfilm Corporation, the claim against Universal is not included; that *by law*, such balance sheets *must* include all assets. [R. p. 499.] One of appellants' witnesses testified: that he was the attorney in Berlin for the Bank; that he had personal knowledge of all facts in connection with the declaratory action; that not only from his knowledge of all the facts themselves, but also because he was versed in German law, the claim against Universal had been validly assigned to Joe May by the Mayfilm Corporation and that that was also the conclusion of the German Court in that action. [R. pp. 488-9.] Another of appellants' experts stated in response to a question as to the effect of the declaratory decree that: "In a German case . . . such judgment would produce more than an assignment." That such decree would have the effect of "an assignment which has

been confirmed by a Court. In a case it would be evidence.” [R. pp. 530, 531.]

Further said portion of finding No. III is not supported by the evidence;

The only evidence offered by Appellees to support the issue covered by that portion of the finding No. III objected to, was the opinion testimony of their experts given in response to hypothetical questions, wherein they stated that the facts as disclosed in the judgment roll of the German Declaratory Decree were insufficient to transfer title of the claim to Joe May. [R. pp. 319-338.] Said experts did admit, however, that under German Law said Decree did establish that as between the litigant parties and their privies, that the claim was owned by Joe May; that said decree *did create law* between said parties [R. pp. 339, 340], and was binding upon them. [R. p. 342.]

(B) Finding No. V [R. p. 37], in its entirety, is erroneous;

Said finding is contrary to the evidence:

The evidence hereinunder is the same as that set out hereinbefore in connection with appellants' objections to a portion of finding No. III and is incorporated hereinunder by this reference thereto, to save space and needless repetition.

Said finding V is not supported by the evidence:

The only evidence received on the issue covered by the finding is the same as that received in connection with finding No. III, hereinbefore set out under appellants' objections thereto, and is incorporated herein by this reference.

(C) Finding No. VI, [R. pp. 37-38], is erroneous. Said finding is contrary to the evidence:

The only evidence appellees may rely upon, is a portion of the Kammergericht judgment roll denominated "Grounds for Decision." [R. p. 128, already set out under Spec. 2, Subsection A.] The error of said finding is: It is based upon *superseded* "Grounds for Decision" which were neither included nor affirmed in the *final* "Grounds for Decision" of the Reichsgericht; it relies upon mere dicta; it confuses said Grounds or dicta as follows: (a) that a "distribution of all assets" to stockholders upon final liquidation is the same as a "sale" for cash of a *portion* thereof, (b) that the issue of proper parties" is the same as the issue of "ownership," (c) that it interprets the "Grounds" into a conclusive determination" of the rights of a person (not a party thereto, *i. e.*, May.) Finally, said finding fails to consider and is contrary to the facts of event occurring after the Kammergericht decision, to-wit: the final Decree of a German Court of competent jurisdiction, which did in fact finally determine the issue of ownership between said corporation and May's assignee.

Said finding is not supported by the evidence:

The substance of the evidence on the issue covered thereby has already been set out hereinabove and is incorporated herein by this reference. The insufficiency of the evidence is that the finding is based upon portions of the "Grounds for Decision" in the Kammergericht judgment, which were not final, and were superseded by the Reichsgericht "Grounds" which are final, and in which no support for said finding can be found.

Further, even if said Kammergericht "Grounds" were deemed effective; they fail to support said finding in that said "Ground" merely answer the defendants' objection therein to the plaintiff being the "proper party" [Pl. Ex. 2, R. p. 127], and *that* was a special issue before that German Court; it did not purport to adjudicate the *ownership* of the claim as between Mayfilm and Joe May, which latter was not a party in that action.

Said finding is further erroneous as to that portion relating to the "conclusiveness" on the issue of ownership as between Universal, Joe May, *their successors* or claimed successors, in that the same constitutes a naked erroneous conclusion of law and as such ignored the legal effect of the subsequent decree both under German and American law.

(D) That portion of Finding IV, [R. p. 36-37] reading as follows: "Under and by virtue of the law of the German Reich said declaratory judgment . . . had no effect upon their (defendants) or either of their rights in respect of the claim referred to in said judgment or in respect of the ownership of said claim, and was and is not evidence as against either of the defendants herein of any of the facts or issues determined or purported to be determined therein" is erroneous.

Said portion of said finding IV is not supported by the evidence. Since the evidence applicable has already been set out under objections to Finding No. III, in order to save space same is repeated herein by reference thereto, as found under Specification 2, Subdivision A.

In particular, appellees' witnesses *did not* testify that the defendant had any rights in the claim or judgment. Defendant became debtor under the judgment and as such *was not claimant of title to a judgment against itself*. Nor is there any evidence to substantiate the conclusion that the declaratory Decree was and is not evidence against the defendant herein of any of the facts or issues determined therein. Appellees' witness admitted that said Decree established, as between the corporation and May's successor that the claim was owned by May. [R. pp. 339, 340.]

The only evidence on the evidentiary effect of the decree in Germany, according to German Law, was that of appellants' witnesses who stated that such decree was good evidence in Germany of an assignment which had been confirmed by a German Court. [R. pp. 500, 501; 530-531.]

Witnesses for both parties herein admitted said Decree was binding upon the parties and their privies in that action, and that it established the German law as to them. The effect of such Decree and law, *as evidence in this action*, must be determined by the law of the forum, to wit, California Law.

Said portion of said "finding" is contrary to the evidence for the same reasons as immediately set out hereinabove.

(E) Finding No. VII [R. p. 38], is erroneous in its entirety.

The substance of the evidence thereunder is: *May-film Corp. in liquidation* obtained a line of credit of 100,000 M. in 1931 from the Bank. [R. p. 273; 275.]

Joe May, who had *purchased* for 45,000 M. certain assets from the corporation in 1930, *including among those assets a then defeated 50,000 M. claim against Universal* [R. pp. 210-212] assigned this *claim* “as security” to the Bank on that *loan to the corporation*, and in addition thereto, he, May, and one Mandl further guaranteed this loan [R. pp. 261, 2; 280, 281.] Said Bank acknowledged that said assignment by May was by way of security only. [R. p. 246.]

On February 9, 1933, the *claim* having ripened into a final judgment against Universal, May made a further assignment thereof to the Bank, “as security.” [R. pp. 245-6; 295-6; 482.]

When Mayfilm Corp. failed to repay the loan to the Bank, the latter required Mandl to pay under his guaranty, which he did in 1936, [R. pp. 246; 281], in the amount of 64,200 M. [R. p. 482.] Said Bank upon receiving payment from Mandl, *actually assigned* the claim against Universal, to Mandl, [R. p. 264-9; 270], and further notified said Universal on February 12, 1936, that Mandl had paid them, that the judgment against Universal “has been . . . transferred to Mandl” and that the judgment could be satisfied by payment only to Mandl. [Pl. Ex. 11, R. pp. 295, 297; Pl. Ex. 5, R. pp. 246-7.]

Appellees offered no evidence of any facts controverting the foregoing statement of events, but did offer *opinion* evidence to the effect that an actual assignment was necessary to transfer the claim against Universal from the Bank to Mandl, that those facts immediately above set out failed to act as such assignment, that the Bank’s

written notice to Universal was insufficient as an *actual* transfer, and that there was no transfer as the result of operation of German Law.

Appellees' witnesses conceded that under these facts, Mandl was entitled to "receive" such transfer [R. pp. 354, 356]; that although the "notice of transfer" was not effective as a transfer, *had Universal paid the judgment to Mandl, they would have been "protected" thereby as against the Bank* [R. p. 349]; that in considering the effect of the wording of the "notice" to Universal, explicit words of transfer were not required under German Law [R. pp. 460; 494, 5]; that those words used therein did constitute an admission against the Bank's interest to the effect that the Bank was no longer Universal's creditor, but that Mandl was, and the Bank "wants" Universal to pay Mandl [R. p. 349]; that in a real assignment express technical words of assignment are not required, and that even an *oral* assignment is good under German Law. [R. pp. 378; 456, 457.] Appellees' witnesses further stated that a judgment as such is not assignable in Germany, but the *claim* upon which it is based may be assigned, even orally, and the title to the judgment follows the claim. [R. pp. 391-392; 328.] They further stated that the following law appears in Section 409 of the German Code. "If the creditor informs the debtor that he has assigned the claim, the notice of the assignment is valid against him, as towards the debtor, *even though the assignment had not been made or is ineffective. It is equivalent* to the notice that the creditor has executed an instrument of assignment to the new creditor named in the instrument and the lat-

ter presents it to the debtor. *The notice can be withdrawn only with the assent of the party who is named as the new creditor.*" [R. p. 439.] (Italics ours.) Also, that Section 410 which requires a debtor to recognize such new creditor only if he is furnished with the assignment provides: "These provisions have no application if the former creditor has notified the creditor in writing of the assignment." [R. p. 440.]

On the issue of *actual assignment* by the Bank to Mandl, appellants' evidence was as follows:

Mandl, himself, testified that the Bank *gave him an assignment of the claim* [R. p. 264]; *that the assignment of the claim was made to him, by the Bank after he had paid on his guaranty*, [R. p. 270.] This evidence was never denied or controverted or disputed by appellees. Appellants' experts stated that an *actual* assignment was not required under German Law [R. pp. 490-5], that the "notice" in itself was a valid assignment from the Bank to Mandl [R. pp. 490; 531-3; 536; 245; 295]; that even if the "notice" contained a reference to an assignment by operation of law, or mistakenly gave as a reason or basis the Code Section 744, that because the intent of the parties was clear [R. p. 495] that under German law the intent ruled. [R. pp. 495-6.]

On the issue of "transfer by operation of law" appellees' witnesses advanced two theories: (a) Security deposited by a debtor passes to the paying guarantor by "operation of law," *only if* the guarantor occupies the position of a "surety," but not if he is a "warrantor." [R. pp. 344; 370, 371.] The distinction, according to the witnesses, was that a "surety" ("Burgschaft") is one

who obligates himself to the creditor of a third person to answer for the debt of the latter; that a warrantor ("guarantie-versprechen") is one, who, by an independent contract, unconditionally guarantees a given result. [R. pp. 343; 369, 70.] With respect to what Mandl's position was said witnesses stated "it was not clear" but admitted that the Bank in its notice had designated Mandl by the German word "*Burgschaft*" meaning "surety," [R. pp. 346, 7; 418], (b) the second theory was that only a "pledge" passes "by operation of law," and that an "absolute assignment" does not, as the latter requires an *actual* assignment to the guarantor. That if the assignment of the claim against Universal from May to the Bank were "as a pledge" it would have been transferred to Mandl, by operation of law, when Mandl paid the Bank, [R. p. 492], but that in their opinion May's assignment to the Bank "was absolute upon its face" and therefore to transfer it to Mandl the Bank should have made an actual assignment. Said witnesses did however admit the following; that an assignment of a claim to a Bank does not need the words "as security" to nevertheless be a limited assignment [R. pp. 401; 404-405; 406; 407]; that May's assignment would be interpreted as having been given "as security," [R. p. 411]; that the "form of making an assignment as a "pledge" or "as security" is the same [R. pp. 406, 7], that a "claim can be pledged" by an assignment, [R. p. 406]. The witness himself stated that "he" would also add the words "I assign as a pledge" or similar words "to show the real intent" and that the reason for the difference between "pledge" and "assignment as security" was "for the out-

side world” in that the holder thereof is restricted in his handling of pledged property [R. p. 408] and the same witness admitted that one who has received something by “an assignment for security” is also restricted in his handling thereof. [R. p. 410.]

Appellees’ witness Golm, conceded that if A (debtor) owes B (creditor) and C (guarantor) assigns to B, “as security” a claim C owns against X, that if C were a “surety” it is a case under Section 774, but if C was a third person, under no obligation to B, and “just wanted to be helpful” (volunteer) there would be no transfer by operation of law, because one who puts up security “WITHOUT BEING A SURETY” is not protected by Section 774. [R. p. 430.] Said Section 774 provides: “Insofar as the guarantor satisfies a creditor, the claim of the creditor against the principal debtor is transferred to him, and the transfer cannot be claimed to the detriment of the creditor. Any objections of the main debtor, from a legal relation existing between him and the guarantor, are not affected.”

To be applied to Section 774, per Section 412, is Section 401 stating among other things that as to transactions under Section 774, that “with the assigned claim the mortgages or liens, *belonging to it, as well as the right arising out of a security given for it, are transferred to the assignee.*” [R. p. 434.] (Italics ours.)

Notwithstanding said code law, one of appellees’ witnesses stated he based his opinion that the transfer did not occur by operation of law on a case in Germany [D’s Ex. E, R. pp. 542-547; 352-3], and the other expert stated he relied greatly thereon for his opinion.

[R. p. 371.] Said witnesses admitted however that even Supreme Court decisions are not effective in Germany to negate or overrule the Code Law. [R. p. 468.] (The trial Court stated in overruling the appellants' objection to the use of said German case, that that decision was not binding, *and was only to be used as the basis for the witness's opinion.*) [R. p. 353.]

The German case so used by appellee's witnesses as the basis for their opinion was as follows: A debtor had assigned "as security" some shares *of stock* to his creditor. A guarantor entered into a *specific written contract* under which the creditor agreed that as and when the guarantor paid the debt, "the shares" "*were to be assigned*" to the latter. Guarantor, after he had paid the creditor, evidently realized he had made a bad bargain, attempted to get his money back from the creditor by advancing a spurious claim to the effect that since the written agreement was a contract to "buy" stock it was *void unless notarized*. The Court quickly rejected this claim by distinguishing the written contract of "guaranty" from one of "sale," and held that a contract that required a creditor to *assign* stock to the guarantor *upon payment of his guaranty obligation* did not need such authentication. *The strict rules and formalities applicable to agreements to buy stock were not applicable.* The creditor in that suit, evidently, out of an abundance of caution presented a further argument to the effect that a written contract was unnecessary because the transaction came under Section 774, Civil Code. The Court held that the theory of transfer by operation of law was unnecessary, not only because the "owner

. . . was ONLY *obligated by contract* to reassign the shares, it is not permissible to apply *directly* Sections 401, 412, of the Civil Code,” but also because Sections 157 and 242* of the Code applied in that “the creditor as owner by way of security MUST TRANSFER” to the guarantor who “consented in advance” *according to contract*; and also the obligation to “transfer” was a “self evident consequence of the legal relation.” “*However, in their economic effect, a transfer of ownership as security and the giving of a pledge are very similar or even coincide.*” (Italics ours.)

First appellants suggest that appellee’s witnesses made a distinction that is not borne out by the case. This distinction was to the effect that an assignment for security is greatly different from an assignment as a pledge. In answering a question on the meaning of the words May used in his assignment to the Bank, appellee’s witness Golm said, “It convinced me that it was assigned absolutely as security. We have this assignment as security. But it wasn’t a pledge. It is just the opposite of a pledge.” [R. p. 401.]

The case used as the basis for the witnesses’ opinion however does not make any such distinction. Quite the contrary, it states that assignments as security or a pledge are practically the same and “*even coincide.*” This being true we submit that if in one instance the security passes by operation of law, it does so in the other instance as well.

*[This section may be found in R. p. 443]; Section 157.

“Contracts are to be interpreted as good faith and credit with due regard to commercial usage required”—Loewy. “Contracts shall be interpreted according to the requirements of good faith, ordinary usage being taken into consideration”—Chung-Hui Wang.

It is further suggested that this case "used as the basis of the experts' opinion" was applicable only to a situation where there was a written contract to transfer *shares of stock*, between individuals, which, according to that case, required rigid formalities, whereas a transfer of a claim (and the judgment based thereon) is not subject to the same formalities, as it admittedly could be transferred by mere "oral" assignment.

Appellants' witnesses testified on this question that transactions in Germany between a Bank and its customer were informal, [R. pp. 497-8], that such transfers of securities were handled with "as little formalities as possible," [R. p. 493], and therefore said witness gave his opinion that the situation in the above case was not applicable to Bank transactions and did not apply to the transactions between the Bank and Mandl. [R. p. 493.] German law requires that all contracts "shall be interpreted according to the requirement of good faith, ordinary usage and *business usage* being taken into consideration" *per appellees' witness*. [R. p. 443.]

Appellants' evidence of the *facts* of Mandl's transaction with the Bank was never controverted by evidence of any other facts nor did appellees deny or disprove the existence thereof. Said evidence showed that Mandl *guaranteed* the obligation of *another person* (rather than warranting a given result) [R. p. 261], that by German Law, Section 765, a person who obligates himself to a third party's creditor to answer for the debtor's debt is a surety, [R. p. 342], and that the Bank's notice to Universal stated that Mandl, as "Burgschaft" ("surety") paid the debt and was therefore "subrogated"

to the Bank's rights against Universal. [R. pp. 246; 346, 7; 418], and the claim against Universal was transferred to Mandl. [R. pp. 295-6.]

Appellants' testimony on the nature of the assignment from May to the Bank was to the effect that in all transactions the type of the transaction and the identity as well as relationship of "parties" must be considered in any interpretation; that there is a difference between an agreement between "two postmen" and an agreement where a Bank is involved; that the assignment from May to the Bank would be that "this is a security; this is a pledge; this would be *prima facie* evidence *because of the parties involved*." [R. p. 532.] That the transfer to the Bank was in "connection with same transaction." [R. p. 532.] That "it is 999 times in a thousand that it has to be a security." [R. p. 533.] This testimony as to facts was never rebutted. Another witness, the Bank's (then) attorney, testified: The assignment of the claim by May to the Bank was done in the "usual way between Banks and their customers for years and years, to give security by transfer of title for debts instead of making only a pledge. [R. p. 490.] "You can give a 'pledge' or make a transfer of title, but in fact, the intention of the parties is only to make a pledge. *It appears like a transfer of title but in fact is a pledge*." [R. p. 491.] That under German Law, regardless of what the words themselves recite, "*it is allowed to show that something what appears to be a transfer of title is, in fact, a pledge*. But let me add that not in one out of hundreds of cases would there be a discussion, because everybody knows that a paper like this is only a so-called 'sicherungsuebereignung' and doesn't intend to be more than a pledge." [R. p. 491.]

That "as to my knowledge *as legal adviser to the Bank*, it is always the meaning, the intention of the parties, in pledging property in the form that transfers the title, that after payment of the debt there shall be as little formalities as possible." If May had paid this debt himself the Bank would never have had to reassign—*maybe it would tear up or give back the original assignment, but it would never be necessary to make a reassignment.* [R. pp. 493-4.] That in this case, because a Bank is involved, because the intention of the parties was clear, there was an assignment by operation of law, and an actual assignment was unnecessary, but the notice from the Bank to Universal "now stands as an assignment, although it is superfluous as an assignment." [R. p. 494.]

Further said finding VII is contrary to the evidence in that there was uncontroverted evidence of an actual formal written assignment *of the claim* and judgment from the Bank to Mandl. [R. pp. 264-270.] It is further contrary to the evidence of the notice itself. [R. pp. 245, 295.] Although the effect of this notice under German Law was disputed by the experts, there is no doubt that under American Law said notice is a valid assignment in that the Bank directed Universal to pay Mandl, and that the judgment could be satisfied *only* by payment to him. Said notice was directed to Universal at *New York, U.S.A.*, and thereby fixed the place of performance at the debtor's residence. The notice further shows that Mandl was a non-resident of Germany.

3. Certain "findings of fact" as hereinafter designated are not sufficient either in form or content to

legally constitute true findings of fact, and are in reality mere naked conclusions of law, leaving it doubtful what particular facts therein referred to were established.

The findings objected to are those portions of IV as set out under Specification 2D, and all of Finding V [R. p. 37] and all of Finding No. VII [R. p. 38.]

An examination of the portion of Finding IV objected to disclose that it is not a finding of the ultimate facts, and merely purports to draw a conclusion of the facts found in the first portion of said Finding IV relating to the Declaratory Decree. The statements therein that the Decree “was not evidence against defendants herein” that it was not conclusive or binding on them or had no effect upon their rights are all naked conclusions.

A further objection to said Finding IV is that the statement that the Decree was “not evidence against defendants” is a question of law and not a question of fact. Therefore as such it has no proper place in findings of fact.

Said portion of Finding IV is further erroneous in that it applies the law of Germany, instead of the American law, in determining the evidentiary value and effect of the final declaratory decree. Under the applicable American law said decree is evidence for the plaintiffs and against the defendant (appellant) herein.

Finding No. V, stating that Joe May did not acquire or succeed to the ownership of the Judgment, again merely states a conclusion of law purporting to state the *legal effect* of various transactions. Further said “finding” in the last sentence thereof states that certain facts

upon which succession is claimed fail to transfer the judgment, but nowhere in said or any findings is there any definite reference to these facts, nor any description thereof, nor any finding as to their existence. Therefore said "finding" is too indefinite to be of any avail herein.

Finding No. VII recites that "none of the transactions had" between or among Joe May . . . the Bank . . . and . . . Mandl *had the effect* of transferring or vesting in . . . Mandl . . . the judgment . . . of the claim. . . . The court's "finding" further stated that the "facts" . . . did not "*have the effect*" under German Law of transferring or vesting in . . . Mandl any part of the Bank's interest in the judgment or claim.

It is self-evident that these statements are not findings of ultimate facts but are mere naked conclusions of law particularly insofar as they state the *effect* of the facts rather than stating what the facts were. Further it is obvious that the court drew legal conclusions from some facts, but fails to find or state what those facts were. The first portion refers to "transactions," the second part refers to "facts as a result of which" certain claims are made, yet neither portion definitely refers to either what those "transactions" or "facts" were, nor describes them, nor their existence. Therefore and further, said "finding" is too indefinite and vague to support the judgment.

4. The Conclusions of Law, [R. p. 39], are, and each of them is, clearly erroneous in the following particulars:

Conclusion of Law No. 1, [R. p. 39], to the effect that "Neither plaintiff or any of their predecessors in interest

(other than Mayfilm A.G.) had or have any right, title or interest in or to the judgment sued upon, or in and to any part of the claim upon which said judgment was based,” and Conclusion of Law No. 2, [R. p. 39] to the effect that “plaintiffs are not entitled to enforce said judgment” and Conclusion of Law No. 3, [R. p. 39], to the effect that “defendant is entitled to judgment, that plaintiffs take nothing and that defendant recover its costs” are, and each of them is clearly erroneous in that the same are (a) contrary to the evidence; (b) not supported by the evidence; and (c) contrary to law.

The evidence hereinbefore set forth, under Specification No. 2 shows that Mayfilm Corp., no longer was or is the owner of the judgment sued upon, or the claim upon which it is based; that the same was transferred from Mayfilm Corp. to Joe May firstly by purchase and assignment, and most certainly by the declaratory Decree; that the same was assigned by May to the Bank and by the Bank to Mandl, and by Mandl to the Union Bank and by the Union Bank to the plaintiffs. (Appellants.)

Said conclusions are and each of them is contrary to law in that they, and each of them, erroneously fail and refuse to give any legal effect to the declaratory Decree as *evidence* in this case; erroneously fail and refuse to give any legal effect to the actual assignment from the Bank to Mandl; erroneously fail and refuse to give any legal effect to the “notice” from the Bank to Universal as an equitable assignment under American Law, or any effect under German Law; erroneously interprets the German Code Law; fails and refuses to give any legal effect to the assignment from Mandl to the Union Bank

or from the Union Bank to the plaintiffs; and lastly under the *evidence* in this case, and the law, the plaintiffs are entitled to judgment against the defendant.

5. The judgment herein is contrary to and is not supported by the evidence.

Since the basis of Appellants objections hereunder are the same as those set out under Specification No. 2 reference is hereby made thereto, and incorporated hereunder.

6. The judgment herein is contrary to law in that the Court:

(a) Erroneously held that the Decree constituted no evidence for appellants against the appellee. (Said Decree, by law, was *prima facie* evidence of muniment or link in the chain of or foundation of title and in the absence of evidence to the contrary (of which there was none), is conclusive on the defendant on the question of ownership as between the parties who litigated that question.)

(b) Erroneously fails to hold that there was an actual assignment from the Bank to Mandl, or that there was an assignment by operation of law.

(c) Erroneously held that the Kammergericht "Grounds for Decision" was *res adjudicata* against appellants upon the question of ownership of the judgment sued upon.

(d) Erroneously held that neither the appellants nor any of their predecessors in interest, other than Mayfilm Corp. have or had any title or interest in and to the judgment sued upon, or in or to the claim upon which it is based.

(e) Erroneously failed to render judgment in appellants' favor for \$24,337.76.

7. The Court erred in restricting the determination of Mandl's rights with respect to the assignment from the Bank to Mandl to that alleged in the pleadings, to-wit: that of "operation of law" only. [Court's opinion, R. pp. 32-33, also R. pp. 402-3.] Evidence received developed the fact that there was an actual assignment. It therefore became incumbent upon the Court to make findings of fact and conclusions of law on the issue thereby created.

This issue of actual assignment was first raised by appellees by adducing testimony to the effect that the notice itself, in their experts' opinion, was not effective as a transfer or assignment of the claim to Mandl. [R. pp. 348, 9.] Appellants were permitted without objection to meet this issue, [R. p. 494], and in fact said issue was further developed by the Court itself through its own interrogations thereon. [R. pp. 495, 96.] In addition to the above appellants introduced the uncontradicted statement of Mandl that there was an actual assignment made. [R. pp. 264; 269-70.] No findings were made in respect to this issue.

8. The Court erred in denying appellants' motion for a new trial.

Said motion is set out on R. pp. 42 to 61, incl., and the affidavits in support thereof are at R. pp. 61 to 77; affidavits in opposition thereto are on R. pp. 78 to 83, incl., and the ruling thereon at R. p. 90.

ARGUMENT, POINTS AND AUTHORITIES.

I.

The Court Erred in Admitting Opinion Evidence Attempting to Show the German Declaratory Decree Was Erroneous. (Specification 1.)

The Court's attention is directed to two outstanding initial facts: Firstly, Universal, in the case at bar, was the original judgment debtor in the German case in which was rendered the judgment sued upon. Neither in that action, or the present one did it *have, or claim any rights to the ownership of the claim or to the judgment*. Secondly, the declaratory Decree was rendered in a subsequent action to determine the ownership of the judgment. The parties were the only two possible claimants thereto, to-wit: the Mayfilm Corp. (the original judgment creditor) and the Bank, which claimed under an assignment from May, who had purchased the claim from Mayfilm Corp. The primary question, in the declaratory action, on the issue of ownership, was whether those various assets *admittedly sold to May by the Mayfilm Corp.* included the original claim against Universal. The Court therein determined that the claim was so included. Thus, said decree merely determined *who* the judgment creditor was, and did not decide any issue or any point which directly or indirectly prejudiced any "rights" of the judgment debtor.

The appellee's objection to the Decree, as disclosed in their answer, was that the same was not binding upon appellee as it had not been a party to that action, and had no knowledge thereof. [R. pp. 19, 20.]

Appellee sought to prove by opinion evidence that the *facts* upon which the decree was based, were *insufficient* (under German law) to support said Decree, and because appellee was not a party to that action, it claimed the right to attempt to show that said Decree was erroneous.

Such evidence was not admissible to impeach the Decree. It attempted to re-examine the facts, and to re-construe and re-litigate them, and thereby show that the legal effect thereof was different than that decreed by the German Court. In short, it attempted to show that the final Decree in that action was "erroneous."

It is well established that strangers to a judgment—that is persons who are not parties or privies—though not bound by it operating as *res adjudicata*—nevertheless cannot attack it collaterally. The exception to this rule is not material here, as it provides that strangers may attack judgments in a limited manner, only if they had existing rights that were prejudicially affected thereby. This rule is stated in 15 *Cal. Jur.* 55, par. 142.; *Bennett v. Wilson*, 133 Cal. 379, 65 Pac. 880; *Mathews v. Hensen*, 124 N. W. 1116, at 1119; 19 N. D. 692; *Nankivel v. Omak, etc.*, 197 N. Y. S. 467, at 470, 203 A. Div. 740; *Cooke v. First Natl. Bank*, 236 Pac. 883, 110 Okla. 111, at 886; *Abbingtion v. Townsend*, 197 S. W. 253, 271 Mo. 602; *McEven v. Sterling Bank*, 5 S. W. (2d) 702, at 707; 34 C. J. 526 and 527; Freeman, *Judgments*, Vol. 1, pp. 636-39.

In *Hunt v. Loucks*, 38 Cal. 372, at page 382, the Court in comparing executions to judgments, said in reference to the "erroneousness" thereof that "it cannot be brought into question even by a party to it, much less, as

in this case by a stranger. Even directly it cannot be attacked by a stranger for it does not lie in the mouth of A to say, by it, B has been made to pay too much money, and therefore all proceedings under it are null and void. That is a question that concerns B only, and if he is content, A cannot complain."

In *Bennett v. Wilson*, *supra* 133, Cal. 379, at 384, the Court approving Freeman on Judgments states: "The parties to an action * * * and all persons, who, though not parties thereto, are not prejudiced by the judgment when rendered, will not be permitted to assail or avoid it in any collateral proceeding for error or irregularity, unless it was such as left the Court without jurisdiction, and the judgment absolutely void as between the parties thereto." Generally, regarding judgments, "they cannot be impeached otherwise than by the record itself, or where lack of jurisdiction appears on the face of the record."

In 34 *Corpus Juris*, 526, 27, citing *Agoure v. Peck*, 17 Cal. App. 759 (121 Pac. 706), in discussing the rule concerning collateral attacks on judgment by a stranger, states that with respect to the judgment "he cannot object to it on account of mere errors or irregularities or for any matter which might have been set up in defense to the original action." The above case further states: "However erroneously the Court may have acted in the premises, it being within its jurisdiction to make the order, its order is not absolutely void. (*Rowe v. Blake*, 112 Cal. 644, 44 Pac. 1084.) In a collateral action, it cannot be brought in question, even by a party to it, much less, as in this case, by a stranger to it. (*Hunt v. Loucks*, 38 Cal. 382, 99 Am. Dec. 404.)"

The Courts of late have gone even further to hold that a judgment *void on its face* which parties and their privies could always attack collaterally that “as to strangers * * * a different rule obtains. They may attack a void judgment only when, if the judgment were given full effect, some right in them would be affected by its enforcement.” (Authorities cited) *Mitchell v. Auto, etc.*, 19 Cal. (2d) 1, at page 7, (118 Pac. (2d) 815.)

It is also well established that where a debtor admittedly owes moneys to one of two claimants, and the claimants litigate their respective rights in the ownership of the moneys so owed between themselves, the judgment in that action which determines the rights of the claimants is conclusive upon the debtor in an action by the successful claimant against the debtor and may not be relitigated by him, and he is conclusively bound thereby, notwithstanding that said debtor was not a party to that action. (Perkins v. Benguet Cons. Mining Co.,) 55 Cal. App. (2d) 720; 132 Pac. (2d) 70.

The California Appellate Court, in this case considered many issues that are paralleled in the case at bar, *Perkins v. Benguet Cons. Mining Co.*, was decided Nov. 30, 1942, [Appendix pp. 4-10]. In this case cited the plaintiff, Mrs. Perkins, was attempting to collect from the defendant corporation dividends on stock of the defendant corporation. The question of ownership of said stock had been previously in litigation in the New York Courts where it was finally decided that Mrs. Perkins and not her husband, Mr. Perkins, was the owner of the stock and entitled to the dividends. Mrs. Perkins demanded the dividends from the defendant corporation and it

refused to pay. The corporation claimed in its defense that Mr. Perkins was entitled to the dividends as the owner of said stock, and not Mrs. Perkins.

In that trial Mrs. Perkins introduced as the *only evidence of her title*, the judgment roll of the New York case. That New York judgment roll disclosed that Mrs. Perkins and Mr. Perkins were the only parties; that the dispute was over the ownership of the stock; that the corporation was not a party thereto. The New York judgment was that Mrs. Perkins and not Mr. Perkins was the owner of the stock, and therefore she was entitled to the dividends thereon.

In the trial of the California case the plaintiff, Mrs. Perkins, "*offered no evidence of her title to the dividends except the judgment roll of the New York action.*" The defendant corporation objected to this evidence, and the objection was overruled, and the New York judgment "*was admitted as competent and conclusive evidence of plaintiff's title.*" The corporation next made an offer of proof the effect of which was to show title to the stock in Mr. Perkins and that the New York judgment was *erroneous*. In sustaining objections to such offer, the trial Court ruled "*that the New York judgment and every finding upon which it rests was conclusive against defendant (corporation) with respect to everything there adjudicated, i.e., res adjudicata in the same way as if defendant (corporation) had been a party to the New York action.*"

In the Appellate Court's opinion it was stated that "the basic contention of defendant (corporation) is that the judgment of the New York Court is not binding on

it because, * * * *it was* not a party or a privy to a party to that action.” Further, several times in the Appellate Court’s opinion special reference is made to the fact that the *defendant corporation claimed no interest for itself in the ownership of the stock*. The corporation insisted that the stock really belonged to Mr. Perkins and claimed the right to prove that the New York judgment was erroneous. In answer to these contentions the Appellate Court stated that in New York “Mr. Perkins had litigated the exact question that defendant corporation seeks to litigate here.” The question thus presented to the California Court was “whether defendant corporation should not be permitted to litigate those identical issues in California, or whether it is conclusively bound by the New York judgment under the doctrine of *res adjudicata*.” The Appellate Court ruled that the doctrine of *res adjudicata* applied; that “the New York judgment bound the defendant corporation even though it was not a party thereto.” The Court reasoned that the defendant corporation claimed no title to stock in itself; it was obligated to perform to Mrs. Perkins; that its “right to attack the New York judgment was no greater than Mr. Perkins’ right to do so” and he was conclusively bound by the New York judgment. That since the corporation claimed no interest in the fund itself and was in the nature of a bailee of the funds thereof “every principal of reason, fairness, justice and equity compels the conclusion that it should be bound by a final judgment *between the two disputing claimants*.”

If in the foregoing case we substitute the name of appellants herein for "Mrs. Perkins," the name of Universal for the "Mining Co.," the Mayfilm Corp. for "Mr. Perkins" and call the stock dividends the "judgment claim against Universal" and designate the New York judgment as the "Declaration Decree" we have the case at bar. The chief differences are threefold: In the case cited the California trial Court did not allow the defendant to attack the New York judgment (Decree) by trying to show "in the opinion of experts" that it was erroneous, whereas the trial Court in the case at bar permitted it to be done. Secondly, that in the cited case, the judgment roll was *competent evidence of title* in Mrs. Perkins, whereas in the case at bar the trial Court held that the Decree was in no way binding or conclusive on Universal and constituted *no evidence of title*.

In *Hughes v. United Pipe Lines*, 119 N. Y. 423, 23 N. E. 1042 and *Commercial Nat. Bank v. Allaway*, 207 Iowa 419, 223 N. W. 167, the same rule announced in the *Perkins* case was enunciated and applied. Extensive quotations from each of said cases are found on pp. 749-52 of the *Perkins* case. [See Appendix pp. 8-10.]

The prejudicial effect of the trial Court's error that permitted appellee to re-examine the Decree is forcibly emphasized upon examining the portions of Findings Nos. III and IV as designated under Specification 2 and all of Finding No. V. These findings are clearly based upon the incompetent expert testimony that sought to collaterally attack the Decree.

It is well established that "if a judge in finding facts falls into error by basing his conclusions upon inadmissible evidence, such an action constitutes sufficient grounds for reversal of the judgment on appeal." *Fishbaugh v. Fishbaugh*, (15 Cal. (2d) 445 at 457).

II.

The Judgment Herein Is Based Upon Findings of Fact, Which, in Material Matters Are Not Sustained by the Evidence, and Are Contrary Thereto. (Specification 2.)

A. The parts of Findings No. III and IV as designated in Specification 2A and 2D, and all of Finding No. V (Specification 2B) are so interrelated that they may be treated together. In effect they find that (a) the Declaratory Decree was not and is not evidence against appellees, and (b) was not binding upon appellees; (c) that the judgment or claim sued upon, notwithstanding said Decree, was still the property of Mayfilm Corp. and that Joe May did not succeed to the ownership of the judgment, and (d) by German law the judgment is still enforceable against Universal by Mayfilm Corp. The argument will follow the order of the above points.

The evidence discloses that both parties to this action are in accord on certain results claimed for the Decree, to wit: that under German law it held Joe May (Bank's assignor) "was" the owner of the claim and that his assignment to the Bank was valid; that the decree established the law as between the Bank and Mayfilm; that the Bank and not Mayfilm was the owner of the claim and judgment; that the Decree was final and conclusive upon the parties to that action, *i. e.*, the Bank and Mayfilm.

It is further undisputed that Universal claimed no interest in the ownership of the judgment or claim; and was in effect a mere "bailee" of a fund, and admittedly owed the moneys claimed.

The Decree itself recites that Joe May had purchased among other assets, said claim from Mayfilm, and that the latter had actually assigned the same to said May.

The evidentiary value or effect of said Decree in the case at bar must be determined by the law of the forum, to wit: California. California Code of Civil Procedure Sec. 1915.

Sayles v. Peters, 11 Cal. App. (2d), 401 at 407, (54 Pac. (2d) 94)

cites with approval 78 A. L. R. 884 the rule thus: "Generally, questions of evidence as, for instance, its *admissibility*, *sufficiency*, *etc.*, are regarded as purely questions of remedy to be governed by the law of the forum" The court states the above rule is supported by a long list of authorities. See also 15 C. J. S. 955, Par. 221; Beale, Conflict of Laws, Vol. 3, p. 1614, Sec. 597.1.

It is the established rule to which California is no exception that: While a judgment is *res adjudicata* and binding only between the parties and their privies, nevertheless there is an exception to the rule universally recognized, which sustains their admissibility in evidence and constitutes *prima facie* evidence for certain purposes against *third persons, who are neither parties nor privies thereto, even though it be only judgment in personam*. This exception is that the judgment rendered in an action involving title to property, and in which it is determined that the title is in one of the parties to the action, is admissible in evidence in behalf of the party claiming under the judgment and subsequently asserting a claim to the property affected by it, *as the foundation of, or as an introductory fact to, or as a link in his chain of title*. (*Chapman v. Moore* 151, Cal. 509 at 515-6 (91 Pac. 324).) [See Appendix pp. 1-3.]

See, also: *Title Insurance Co. v. U. S. F. & G. Co.* (8 Pac. (2d) 912), 121 Cal. App. 73 (76-77) [See Appendix pp. 3-4]; *Scott v. Warden*, 111 Cal. App. 597, at 593-4 (296 Pac. 95); 15 Cal. Jur. 184; Cal. Code Civil Procedure, Sec. 1851; *Ellsworth v. Bradford*, 186 Cal. 316, at

325 (199 Pac. 335); *Barr v. Gratz's Executors*, 4 Wheaton 213, 4 Law. Ed. 533 (see annotation in respect to aforesaid rule following this case in 4 Law. Ed. at p. 852. This case is cited with quotations from it, in *Chapman v. Moore, supra*); *Mathews v. Hanson*, 124 N. W. 1116-1118, 19 N. D. 692; *Campbell v. McLaughlin*, 270 S. W. 257 (259-60) (Tex. Civ. App.); *Railroad Equipment Co. v. Blair*, 145 N. Y. 607, 39 N. E. 962; *W. T. Carter & Bros. v. Rohden*, 72 S. W. (2d) 620-625 (Tex. Civ. App.); *Fuller v. Mohawk Fire Ins. Co.*, 245 N. W. 617 (618), 187 Minn. 447; *Harwick v. Hook*, 8 Ga. 354, at 358-9; *Baten v. Kirby Lumber Co.*, 103 Fed. (2d) 272, at 274; *Minn. Debenture Co. v. Johnson*, 102 N. W. 381-382, 94 Minn. 150; *Cameron v. Cuffee*, 144 S. W. 1024-1028 (Tex. Civ. App.); *Virginia etc. v. Charles*, 251 Fed. 83, at 115; *MacMillan v. Walker*, 93 Pac. 520, 48 Wash. 342; *Owens v. N. Y. etc. Co.*, 45 S. W. 601 (603) (Tex. Civ. App.); *Black on Judgments*, Vol. 2 (2d Ed.), p. 921, par. 607; 34 C. J. 1054.

In such an action the judgment which determines that one of the parties has a right or title superior to that of the other party, has the effect of an involuntary transfer from the unsuccessful party to the other. *Restatement of the Law, Judgments*, p. 524, par. 110; also p. 502, par. 104d; *Title Insurance Co. v. United States F. & G. Co.*, *supra*; *Chapman v. Moore, supra*; *Scott v. Warden, supra*, and other cases cited *supra*.

This rule applies alike to questions of title to either real or personal property.

Ry. Equip. Co. v. Blair, supra (involving title to freight cars); *Hardwick v. Hook, supra*, involving title to a slave; *Perkins v. Benguet etc.*, 55 Cal. App. (2d) 720 (132 Pac. (2d) 70), involving ownership of stock and dividends, heretofore cited at length under argument on Specification 1, and in Appendix at pages 4-10.

It is now well established that a judgment determining that one of two claimants is the owner of a claim against a debtor is res adjudicata and conclusive against the debtor in a later action brought by the successful claimant to enforce payment of said claim, notwithstanding that the debtor was not a party to the former action between the claimants. Perkins v. Benguet, 55 Cal. App. (2d) 720. This case has been set out at length hereinbefore in our argument, under Point I. Hughes v. United Pipe Line Co., 119 N. Y. 423, 23 N. E. 1042; Commercial National Bank v. Allaway, 207 Iowa 419, 223 N. W. 167.

Said findings in view of the rules hereinabove stated are contrary to the evidence in that the Decree determined that the Mayfilm Corp. was not the owner of the claim against Universal; that Joe May was the owner; that his assignment to the Bank was valid and that the latter succeeded to the ownership thereof as assignee of said May. The judgment roll supporting the Decree refers to the enjoining of Mayfilm Corp. from enforcing the judgment against Universal. The restraining order was granted upon Joe May's motion. [R. p. 210.] The court should have made its findings in accord with the Decree.

According to the rule announced in the foregoing cases the Decree was entitled to be given full evidentiary value. Had the trial court done so, the opinion evidence of the experts would not only have been inadmissible, but if admitted would have to be considered futile and ineffective to overcome the Decree. It is therefore conclusive as a matter of law that there is no evidence sufficient to support the findings complained of. Further, had the court given proper evidentiary value to the Decree it would have been compelled to find that Mayfilm Corp. was *not* the owner of the judgment and therefore could not lawfully enforce it.

B. Finding No. VI [R. pp. 37-8] is erroneous as it is not supported by the evidence and is contrary thereto.

This finding recites that the Appeal Court (Kammergericht) "found" that the claim against Universal had not been transferred to Joe May. The trial court concludes therefrom that the "Grounds of Decision" of the German court *was and is* a conclusive determination of that issue between Universal on one hand, and Mayfilm Corp. and its successors on the other.

Since the only evidence upon which said Finding VI can be based is the Kammergericht Judgment Roll in that portion designated as "Grounds for Decision" [R. pp. 128 *et seq.*] it is necessary to examine same carefully. It should be noted first that the German court recites that defendant therein (Universal) contended that Mayfilm Corp. was not "*entitled to sue*" [R. p. 128] for the reason that "besides other assets the claim sued upon" belonged to Joe May, although *by agreement* the suit "*was to be continued by the corporation.*" [R. p. 129.] The court ruled that "Plaintiff (Mayfilm) *is entitled to sue upon the claim.*" Appellants urge that the "grounds" are "merely *dicta*, could not be used against" the Bank "or Mr. May because they were NOT parties thereto, and because the factual conditions upon which "they are based" are not in existence, as was presented in the declaratory action. [R. p. 222.] The language used in the declaratory action states the situation so well that the same is hereby adopted.

"The District Court of Appeal assumes that the agreements made with the defendant were those of a corporation liquidation, and that the corporation debts had to be paid first. As far as the first premise is concerned, the District Court of Appeal overlooks the fact that the Mayfilm Corporation was not in liquidation at the time when the agreement in question was made, to wit: in the year 1930. At the time when

the agreements between the stockholder, May and Aussenberg were made, and the directors of the corporation agreed that upon payment of 45,000 Marks a number of assets be assigned to the stockholder, May, the corporation was alive and nobody thought of its liquidation." . . .

"If the District Court of Appeal speaks of a distribution of the assets among stockholders, this is a mistake as to the actual facts. The distribution to stockholders takes place, if assets are turned over to stockholders, either without any consideration, or upon transfer of stock, *not however, if sales take place upon cash payments.*" . . . (Italics ours.)

"The further consideration of the District Court of Appeal that it required the payments of the debts of the corporation is based upon a wrong factual assumption, to wit: that there were debts. The debts of the defendant originated in the year 1932. In the year 1930, the defendant, whose business, as was mentioned before, was at a standstill, was a corporation which had nothing but assets."

It is quite evident that the Kammergericht "ground" were not *res adjudicata* as to May, as he was not a party thereto. Further, it must be seen that the question of "ownership" of the judgment was later passed upon in Germany, by a court of competent jurisdiction, and therefore that fact demonstrates that the "grounds" were not "*res adjudicata*" as to Joe May. (Declaratory relief action hereinbefore described.) In that action we again adopt language found in the judgment roll:

"Defendant wants to prove the lack of authority of Mr. May to the claim by the court files, Mayfilm Corporation versus Universal, particularly by the judgments rendered therein by the District Court of

Appeal and the Supreme Court. In the conclusions of law of the Supreme Court Judgment, the question of the right of the then plaintiff, Mayfilm Corporation, to the claim was not mentioned at all, because the then defendant, Universal, did not question before the Supreme Court plaintiff's authority to sue."

Finally, the "effect" of said "grounds" according to German law was considered by the German court in the later declaratory action as it was specifically urged therein, and the answer offered by the plaintiff therein was:

"The question is immaterial, however, because naturally, the conclusions of the judgment of the District Court of Appeal did not become final, and that the Superior Court, which is now trying this case anew, has to examine the question of the right to the claim." [R. p. 221.]

Further, in the "Grounds for Decision" in the declaratory action the court stated in referring to the ownership of the claim that "In spite of the fact that the lawsuit was continued under the old title, the claim belonged to Joe May" who bore the costs of the litigation to the Kammergericht and to the final revision in the Reichsgericht. [R. pp. 229-30.]

Appellants urge that the "grounds" of the Kammergericht judgment were first, mere *dicta* and are not to be *given the effect of a judgment* so as to bind anyone, much less Joe May; second, they were superseded by a Supreme Court decision on appeal; third, that they cover only the question of *proper party* and not the question of *ownership*; fourth, the question of *ownership* was determined when *that* issue was in question in a later action by a German court of competent jurisdiction; fifth, the Mayfilm Corp. if it ever had any rights to the claim against Uni-

versal, was, by subsequent events, legally and judicially divested of them, and a final determination made to the effect that Joe May, not Mayfilm Corp., was the owner of the claim and judgment.

We can thus see that the only evidence in the entire record on the force, effect and construction of the Kammergericht "grounds for decision" on the issue of *ownership* of the claim, is the later final Decree in the declaratory action. This not only is the *only* German law in evidence on the subject, *it is a statement of construction of the Kammergericht "grounds" according to German law, by a German court of unchallenged jurisdiction.* Therefore, any finding made by the trial court, such as Finding No. VI that deviates from or contradicts the construction and effect of the "grounds" as judicially and *finally adjudicated* in Germany, is not only contrary to the *only* evidence in the case, but is totally unsupported by any evidence whatsoever.

Appellants submit that the trial court was obliged to follow the construction of the "grounds" as decreed by the German court in the declaratory relief action. We submit that where a *German* court has placed a construction or interpretation upon a *German* judgment, that the same rule of law is applicable with respect thereto, to wit: that such construction must be followed by the courts of the forum, as is applicable to the case where a foreign statute has been construed by the courts of the jurisdiction of their enactment. In the latter instance it is well settled that in construing the statutes of a foreign state the construction placed thereon by the courts of the state of their enactment will be followed by the courts of the forum. *McGrew v. Mutual Life Insurance Co.*, 64 Pac. 103, 132 Cal. 85, 89; *McMannus v. Red Salmon Canning Co.*, 173 Pac. 1112, 37 Cal. App. 133, 137; *Platnes v. Vincent*, 229 Pac. 24, 194 Cal. 436; *People v. Goddard*, 258 Pac.

447, 84 Cal. App. 382, 386; *Restatement — Conflict of Laws*, p. 737, par. 621c.

Assuming, however, that the trial court could place its own construction thereon, it would have been forced to the same conclusion as stated in the Decree, because under American law that portion of the “grounds” relied upon by appellee and the trial court as constituting *res adjudicata* does not constitute *res adjudicata* herein for the following reasons:

a. In the Kammergericht judgment the issue was “*proper party*” and in the case at bar the issue was *ownership*. In order that a judgment in one action may constitute an estoppel against a party thereto in a subsequent action, it must be made to appear that upon the face of the record or by extrinsic evidence, that the identical issues involved in the second action was determined in the first action. Unless the issues are identical, there can be no *res adjudicata*. *Hemet v. Oake Hemet Water Co.*, 69 Pac. (2d) 849, 9 Cal. (2d) 136, at 142; *Beronio v. Ventura Co. Lumber Co.*, 61 Pac. 958, 129 Cal. 232 at 236; *Title Guarantec & Trust v. Munson*, 11 Cal. (2d) 621 at 630, 81 Pac. (2d) 944.

b. The Kammergericht “grounds” “assumed” *but did not decide* that the claim was not in reality “assigned” to Joe May. [R. p. 129.] The word “assigned” is quoted by the German court. That court also stated by way of argument that it is “supposed” that the Mayfilm Corp. was “authorized” to *continue* the litigation, by agreement. Actually that portion of the “grounds” purporting to deal with the ownership of the claim as distinguished from the question of proper party plaintiff, is based upon speculation and conjecture and was collateral to the main issue.

It is well settled that in view of the certainty required in estoppel, nothing must be left to argument or inference.

If upon the face of the record anything is left to conjecture, as to what was necessarily involved and decided, there is no estoppel on it when pleaded, and nothing conclusive in it when offered in evidence, and a judgment cannot be conclusive of any matters which came only collaterally in issue, nor of any matters incidentally cognizable. Although collateral evidentiary matters may be offered, controverted and denied, they are not concluded by the judgment. *People v. Bailey*, 158 Pac. 1036, 30 Cal. App. 581 at 589; *Title Guarantee and Trust Co. v. Munson*, 81 Pac. (2d) 944, 11 Cal. (2d) 621-632; *Blumenthal v. Maryland Casualty Co.*, 6 Pac. (2d) 965, 119 Cal. App. 563 at 566-567; *Lillis v. Emigrant Dutch Co.*, 30 Pac. 1108, 95 Cal. 553; *Co. of Sonora v. De Winton*, 287 Pac. 121, 105 Cal. App. 166 at 177; *Estate of Haydenfeldt*, 59 Pac. 839, 127 Cal. 456 at 459; *Adler v. Smiley*, 104 Pac. 997, 11 Cal. App. 343 at 347. Further, the consideration by the Kammergericht as to the character of the title between Joe May and Mayfilm Corp. was entirely unnecessary for the disposition of the issue as to proper party plaintiff, and as a consequence, *any declaration as to the nature, extent or kind of title was without any binding force in respect thereto as between Mayfilm Corp. and Joe May, and without any binding force as an adjudication either upon the parties, their privies or anybody else.* *Fulton v. Hanlow*, 20 Cal. 450, at 483.

c. The Kammergericht "grounds" in so far as it purports to adjudicate the ownership between Joe May and Mayfilm Corp. cannot be considered *res adjudicata* herein, because in the Kammergericht action, Mayfilm Corp. and Joe May were not adverse parties therein, but on the contrary in that action, their interests coincided, *i. e.*, that judgment be recovered against Universal in the name of Mayfilm Corp. therein for the amount sued upon. Since Joe May not only was not a party thereto, but was not

an adverse party, as to Mayfilm Corp., the doctrine of *res adjudicata* could not apply as to the determination of any rights between Mayfilm Corp., and Joe May, as to the ownership of the claim. The rights between assignor and assignee, transferee and transferor as between themselves, cannot be determined in any action with a third person *unless both assignor and assignee are parties thereto and are adverse parties*. *Live Oak Cemetery Assn. v. Adamson*, 288 Pac. 29, 106 Cal. App. 783 at 787; *Tabour Realty Co. v. Nelson*, 184 N. W. 196, 44 S. D. 369; *West Texas Bank v. Rice*, 185 S. W. 1047 (Tex. Civ. App.); Section 1910, *Code of Civil Procedure*; *Blood v. Marcuse*, 38 Cal. 590, 595; *Restatement, Judgments*, p. 466, par. 93d 13.

As to any collateral agreement between Mayfilm Corp. and Joe May as to their relationship to each other and the rights between themselves, the defendant in the Kammergericht action was not concerned. *Knobolch v. Ass'd Oil Co.*, 152 Pac. 300, 170 Cal. 144; *Vance v. Gilbert*, 174 Pac. 42, 178 Cal. 574 at 577; *Hentig v. Johnson*, 107 Pac. 582, 12 Cal. App. 423 at 425; *Ralph v. Anderson*, 200 Pac. 940, 187 Cal. 45 at 48.

As Mayfilm Corp. was entitled to sue, it was the real party in interest, and it is immaterial to the defendant in the Kammergericht action whether Mayfilm Corp. did so as the trustee of Joe May, or otherwise. *Anson v. Townsend*, 15 Pac. 49, 73 Cal. 415 at 419.

d. Even if it should be deemed that Joe May was a party to the Kammergericht action, by reason of purchasing the claim *pendente lite*, such circumstances would only make Joe May a co-party or co-plaintiff, and under such circumstances, the rights between Mayfilm Corp. and Joe May as to their claims of ownership between themselves to the claim sued upon therein, could not be adjudicated nor would any purported adjudication in respect thereto

constitute *res adjudicata* because said parties were not adverse parties therein. Parties must be *adverse parties* in an action before any matter as between themselves can be deemed *res adjudicata*. *C. C. P.* 1910; *Robson v. Superior Court*, 154 Pac. 8, 171 Cal. 588-594-5; *Victor Oil Co. v. Drumm*, 193 Pac. 243, 184 Cal. 226-239; *Estate of Heydenfeld*, 59 Pac. 839, 127 Cal. 456 at 459; *Black on Judgments*, Vol. 2, par. 550, p. 906.

Where a party acquires an interest in the litigation *pendente lite*, his position in the litigation is analogous to a co-party to his assignor. *Black on Judgments*, Vol. 2, p. 906, par. 550; *Cray v. Word*, 37 Barb. 377, 153 Ind. 5, 53 N. E. 94.

e. Even were it assumed for the sake of argument that the Kammergericht "grounds" constituted a form of adjudication as between Joe May and Mayfilm Corp. as to the actual ownership of the claim involved therein, still the declaratory Decree which adjudicated their actual ownership of the claim and judgment, and which was between the two claimants thereto, would prevail as to the determination of the rights of ownership as between Mayfilm Corp. and Joe May. It is a general rule that where the question has arisen as to the operation or the effect of two judgments, adjudications upon the same matters, which are inconsistent, then it is held that the second, or judgment later in point of time, prevails. Under such circumstances, the declaratory judgment must be deemed to determine the rights of ownership between Mayfilm Corp. and Joe May, since it was later in point of time. *Wood v. Pendelay*, 35 P. (2d) 526, 1 Cal. (2d) 435; *Calif. Bank v. Tracger*, 10 P. (2d) 51, 215 Cal. 346; 15 Cal. Jur.

104 and 105; *Semple v. Wright*, 32 Cal. 659; *Semple v. Ware*, 42 Cal. 619; *Perkins v. Benquet*, 55 Cal. App. (2d) 720 at 744 (132 Pac. (2d) 70).

f. But even were it to be conceded for argument's sake that the Kammergericht "grounds" constituted some form of *res adjudicata* as to said ownership such adjudication was effective as of the date of its entry, July 27, 1932. Any title to the claim acquired by Joe May thereafter would be admissible herein. Since the Decree adjudicated that issue and became effective as of February 25, 1935, the effect of such Decree is that as of February 25, 1935, Joe May was the owner, and even though prior thereto, Mayfilm Corp. might have been the owner thereof, the said Decree constituted in force and effect, the transfer of whatever interest Mayfilm Corp. may have had to Joe May. Facts occurring subsequent to or title acquired subsequent to a prior adjudication, defeats the claim of *res adjudicata* of a former judgment. *District Board v. Hilliker*, 98 Pac. (2d) 782, 37 Cal. App. (2d) 81 at 96; *Torne v. McKinley Bros.*, 56 Pac. (2d) 204, 5 Cal. (2d) 704 at 708-9; *Hurt v. Albet*, 3 Pac. (2d) 545, 214 Cal. 15 at 26; *Kirbe v. G. Graves*, 191 Pac. 81, 47 Cal. App. 575.

We therefore submit that said Finding No. VI, under German law or American law, finds no support in the evidence, is contrary thereto, and is contrary to law.

C. Finding No. VII [R. p. 38] is erroneous as it is not supported by the evidence and is contrary thereto.

This finding states that even if the Bank had the ownership of the claim and judgment, that under German law the transactions had between and among the Bank, Joe

May and Mandl did not have the effect of transferring the same to Mandl.

Appellants claimed that there was a transfer to Mandl by operation of law, and relied upon the German code sections. Appellants claimed a further transfer to Mandl by virtue of the notice sent by the Bank to Universal which acted as an equitable assignment, *and also claimed a transfer as the result of an actual assignment given by the Bank to Mandl.*

Appellees by expert opinion sought to show the code sections were not applicable, and claimed that the notice was not an assignment. Appellees at no time denied or controverted the appellants' evidence that there was an actual assignment given. Appellees conceded that the claim could be assigned orally or in writing and that the judgment followed the claim.

As to assignment by operation of law. The code sections cited in Specification 2E are pertinent. Sec. 774 [R. p. 250] provides that where a guarantor satisfies a creditor, the latter's claim is transferred to the former. Sec. 401 [R. p. 251] states that in such cases covered by Sec. 774 that with the claim so transferred, . . . that any security given is likewise transferred to the paying guarantor. Sec. 409 [R. p. 439] in effect states that notice of such assignment to the guarantor, when given to the debtor is valid against the creditor as towards the debtor, even though the assignment is not made or is ineffective. It has the effect of notice to the debtor of assignment, and *presentation thereof* by the assignee.

The uncontroverted evidence showed that Mayfilm Corp. was the debtor, that Joe May, as guarantor, assigned the judgment to the creditor, Bank; that Mandl was also a guarantor and paid the debt. Therefore Mandl by virtue of German law became the owner of the security, *i. e.*, the judgment against Universal. It was undisputed that the Bank, upon receiving payment, notified Universal in New York of the assignment to Mandl and thereby, by virtue of Sec. 409, protected Universal if it paid Mandl, and estopped itself from claiming payment from Universal.

Appellee contended the code sections did not apply because firstly, May had made an absolute assignment of the judgment to the Bank, and that therefore German law required an actual assignment to Mandl; that even if the judgment could be transferred by operation of law, it could be transferred only to a “surety” but not to a “warrantor.” They did admit, however, that the Bank, in describing Mandl, referred to him as a “surety.” The appellees’ experts based their opinion upon the code sections and a distinguishable and inapplicable case. It is conceded that in Germany even Supreme Court cases annunciate the law of the particular case decided, and, unlike the law of America, cannot reconstrue or negate the code law, which latter is supreme. Appellants submit that expert opinion is pitifully ineffective to interpret code law contrary to the plain, unambiguous language contained therein.

Further, the uncontroverted evidence discloses that in Germany the law recognizes “commercial usage.” [R. p. 498.] That thereunder the business transaction between a bank and its customer were interpreted differently than

transactions between other parties. That the dealings between bank and customer were informal; that the transfer of the securities were handled with as little formalities as possible. That thereunder the transaction between Mandl and the Bank was controlled thereby so that the security, upon the occurring of the "deserving condition," was transferred to Mandl without any act being done or required to be done. [R. p. 497.] That further, with respect to the transaction under which Mandl became a guarantor, the intention of the parties prevailed in interpreting their transactions; that German law required "that all contracts shall be interpreted according to the requirements of good faith, ordinary usage and business usage being taken into consideration." [R. p. 443.] Therefore, under German Code law the judgment was transferred to Mandl by operation of law. Under Specification 2E we have discussed and distinguished the case used by appellee as the basis of their experts' opinion. We submit that in the light of said discussion and the German law of *custom and business usage* the case must be disregarded and considered inapplicable to Bank transactions.

Also, under German law, Section 409 [R. p. 439], since the Bank notified Universal of the transfer to Mandl, the legal effect of said notice was to transfer the claim, by operation of Section 409, to Mandl, "even though the assignment had not been made, or is not effective." "It is equivalent to the notice that the creditor has executed an instrument of assignment to the new creditor named in the instrument and the latter presents it to the debtor." This notice could not be withdrawn except with the new creditor's consent.

The effect of said German Code section was to *validate* assignments which otherwise were incomplete or ineffectual because of certain deficiencies.

We submit that under German law there was an assignment to Mandl by operation of law.

Even if it were to be held that there was not an assignment by operation of law, Finding VII must fall because the undisputed, unchallenged and uncontroverted evidence discloses that *there was in fact an actual written assignment of the judgment against Universal executed by the Bank and delivered to Mandl*. Portions of Mandl's testimony taken from his deposition are herein set out. [Pl. Ex. 9, R. pp. 261-70.]

"Q. Have you any documents here which pertain to your negotiations with the bank for such guarantee? . . . A. No." [R. pp. 261-2.]

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"Q. Were any documents or letters exchanged between you and the bank pertaining to your taking over this guarantee? A. Yes.

Q. Where are such documents or letters at the present time? A. They may be in Vienna, I don't know. . . .

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Q. Do you think those documents are in Vienna at the present time? A. Yes." . . . [R. p. 262.]

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Q. Do you recall in what form payment was made by you to the bank on the said guarantee? A. Yes.

Q. In what form was payment made? A. To the debit of my French franc account with the Bank for Foreign Commerce at Berlin.

Q. As a result of this payment which the bank obtained from you under your guarantee, do you recall that the bank gave you an assignment of a certain claim which they held against Universal Pictures Corporation, New York City, U. S. A.? . . . "A. Yes." . . . [R. pp. 263-4.] . . .

Q. This assignment which you made to the Union Bank & Trust Company originated as an assignment to you from the Bank for Foreign Commerce in Berlin, is that correct? . . . A. Yes, the same thing.

Q. And the assignment which was made to you by the Bank for Foreign Commerce at Berlin, of a claim against Universal Pictures Corporation, was made after you had paid your guarantee to the Bank for Foreign Commerce in French francs?" [R. p. 269.] . . . "A. Yes." [R. p. 270.]

Appellants submit that the foregoing must be accepted as conclusively showing an actual assignment. It was never impeached, contradicted or denied by appellees. *It was the only evidence on the question of an actual assignment*, and the court should have found upon that issue in accordance therewith.

Further, said Finding VII is contrary to the evidence for it failed to give any effect to the notice of transfer sent by the Bank to Universal. [R. pp. 245, 295.]

Although the effect of this notice under German law was disputed by the experts, there is no doubt that under American law said notice is a valid assignment in that the Bank *directed* Universal to pay Mandl, and that the judgment could be satisfied *only* by payment to him. Said

notice was directed to Universal at *New York, U. S. A.*, and thereby fixed the place of performance at the debtor's residence. The notice further shows that Mandl was a non-resident of Germany, to wit: Austria. (Before the "anschluss.")

This document was *more than a mere notice*. It contained a recital of the transactions had, recited that the claim against Universal has been transferred to Mandl and *directed Universal to pay Mandl, and stated that said debt could be satisfied only by paying Mandl*.

This, under American law, constituted an "*equitable*" assignment and transferred the legal title to said judgment to Mandl. The American law must be applied in interpreting the legal effect of said notice for the following reasons:

Either the law of the forum applied, to wit: California, or the law of the place where the debtor resided, where it received the notice, where its obligation to pay Mandl became fixed, and where demand for payment was made, to wit, New York.

In either case the law is the same. In both places the "notice" of and by itself is an "*equitable*" assignment and constituted Mandl the legal owner of the judgment.

The question of whether the "notice" conferred upon Mandl the ownership of the judgment so as to permit him or his successors, as such owner to prosecute an action against Universal *must be determined by the law of the forum*. As stated in *Jos. Dixon Crucible Co. v. Paul*, 167 Fed. 784, 786 (C. C. A. 5):

"When suit is brought by an assignee of a chose in action, the question as to whether the assignment

conferred on him such a right as he asserts *must be determined by the law of the forum.* (Italics ours.) The suit at bar being brought by an assignee in a United States Court of law in Florida, the question raised by the defendant whether or not the assignment vests such title in him as to authorize the suit as brought, and to entitle him to judgment in that Court must be determined by the laws of Florida.'

To same effect: *Pritchard v. Norton*, 106 U. S. 124, 1 S. Ct. 102, 27 L. Ed. 104; *Beale-Conflicts of Laws*, Vol. 3, p. 1603, par. 588.1; *Williston on Contracts*, Rev. Ed., Vol. 2, p. 1296, par. 446; *Restatement, Conflict of Laws*, p. 705, par. 388.

6 C. J. S., "Assignments," p. 1138, par. 82, states:

"It has been held that the effect of an assignment is to be determined by the law of the forum, or the place where rights claimed under the assignment are sought to be asserted."

The *legal effect* of the "notice," therefore, is governed by the laws of California where suit was brought. (Universal maintained a place of business in California.) Under California law, it is well settled that in order to constitute an equitable assignment no express words are necessary, if from the entire transaction it clearly appears that the intention of the parties is to pass title. The order, direction, or request of a creditor to his debtor that the latter shall pay money due the former to a third party constitutes an equitable assignment, and vest in the third party the ownership of the funds, and the right to prosecute the action against the debtor for the recovery thereof. *Puterbaugh v. McCray*, 144 Pac. 149, 25 Cal. App. 469,

471; *Title Insurance v. Williamson*, 123 Pac. 245, 18 Cal. App. 324; *Brady v. Rauch*, 94 Pac. 85, 7 Cal. App. 182; *Gomez v. Warren*, 91 P. (2d) 214, 33 Cal. App. (2d) 313; *McIntyre v. Hauser*, 63 Pac. 69, 131 Cal. 11; *Cutner v. Lyndon*, 60 Pac. 462, 128 Cal. 35; *Chapman v. Cannon*, 75 P. (2d) 522, 24 Cal. App. (2d) 448; *Oxnard v. Penn*, 23 Pac. (2d) 823, 132 Cal. App. 763; *Tornquist v. Johnson*, 13 Pac. (2d) 405, 124 Cal. App. 634 (equitable assignment of judgment). The "notice" under California law clearly was an equitable assignment, but if the law of California be not applicable, then most certainly the law of New York must be applied, for that is where Universal received the notice, and the obligations of the debtor became fixed as to Mandl. *Dow v. Gould and Curry S. M. Co.*, 31 Cal. 629, 652; and that is where performance (payment) of the judgment under said "notice" was contemplated. The notice, therefore, was to be interpreted according to the law of the place of performance. (C. C. 1646.) Where an assignment is made in one place and to be performed in another, the law of the place of performance will control in determining the validity of the assignment, or whether an assignment exists. *Goodchild*, 290 N. Y. S. 683, 160 Misc. 738; *Thompson v. Erie Ry.*, 131 N. Y. S. 627, 147 App. Div. 8; *A. B. T. v. Ann. Trust etc. Bank*, 159 Ill. 467, 42 N. E. 856; *National Bank of America v. Ind. Banking Co.*, 114 Ill. 483, 2 N. E. 407; *N. W. Mutual Life Insurance Co. v. Adams*, 155 Wis. 335, 144 N. W. 1108.

Under the law of New York the order, direction, or request of the creditor to his debtor that the *latter shall pay the debt due the former to a third person* constitutes

an equitable assignment of the funds, and vests in the third person the ownership and the right to prosecute the action against the debtor for the recovery thereof. *Hinkle Iron Co. v. Cohn*, 128 N. E. 113, 229 N. Y. 179; *Spencer v. Standard Chemical Co.*, 237 N. Y. 479, 480, 143 N. E. 651; *People ex rel. Martin etc. Co. v. Westchester County*, 57 App. Div. 135, 67 N. Y. S. 981; *Brill v. Tuttle*, 79 App. Div. 550, 81 N. Y. 454; *Lauer v. Dunn*, 115 N. Y. 405, 22 N. E. 270; *Fairbanks v. Sargent*, 117 N. Y. 320, 22 N. E. 1039; *Wright and Oden Co. v. Shayer*, 165 N. Y. S. 569; *Clearly v. Fogg*, 280 N. Y. S., 244 App. Div. 632; *Kalb v. Lcff*, 18 App. Div. 447, 246 N. Y. S. 158; *Maynes v. Ludino*, 278 N. Y. S. 355, 154 Misc. 519.

The "notice," therefore, under New York law clearly constituted an "equitable" assignment and was sufficient to transfer the ownership of the judgment to Mandl. The mere fact that Mandl was not the plaintiff in this action is immaterial for as stated in 6 C. J. S. "Assignments," p. 1121, par. 69:

"In an equitable assignment it appears to be immaterial whether the suit is between the assignee and the obligee of the chose, or between the assignee and the assignor, or those claiming under them."

The evidence clearly showed that there was an equitable assignment, and the court should have so found.

The evidence herein also showed that Mandl considered that he had a valid assignment from the Bank, and the Bank so considered it. The court therefore should have found that there was in fact an assignment.

Where both assignor and assignee admit and concede that an assignment has been made, *the debtor cannot question the validity thereof, or the effectiveness thereof.* *Dorner v. Heffner*, 58 Pac. (2d) 1308, 15 Cal. App. (2d) 97, 101; *Van Dyke v. Gardner*, 22 Misc. 113, 49 N. Y. S. 328; *Cornish v. Marty*, 76 Minn. 493, 79 N. W. 507.

Neither could the appellee herein object to the validity of the assignment because of its contention that possibly alleged creditors might have objected to the same. *Blackford v. Westchester Fire Insurance Co.*, 101 Fed. 90.

In order to create a valid assignment it is not necessary that the debtor acknowledge the validity thereof, but where the debtor has received notice from the assignor that an assignment has been made, debtor cannot decline to acknowledge the validity thereof unless notified of the invalidity thereof by the assignor. *Goodman v. Zitserman*, 47 R. I. 466, 134 Atl. 34; *St. John v. Charles*, 105 Mass. 262.

The evidence proves an assignment from the Bank to Mandl and the court should have so found.

From the foregoing analysis it clearly appears the necessary and material findings herein not only are unsupported by the evidence, but in fact are contrary thereto. The findings objected to therefore cannot be sustained, without which the judgment herein must be reversed.

III.

Portions of Findings IV, V and All of VII Are Not Sufficient Either in Form or Content to Legally Constitute True Findings of Fact, and Are in Realty Mere Naked Conclusions of Law, Leaving It Doubtful What Particular Facts Therein Referred to Were Established. (Specification 3.)

The findings objected to are those portions of IV as set out under Specifications 2D, all of Finding V [R. p. 37], and all of Finding No. VII. [R. p. 38.]

It is well established that a purported general finding which is in effect but a conclusion of law is insufficient. 24 *Cal. Jur.* 974, note 13; *Hammond Lumber Co. v. Barth Inv. Co.*, 262 Pac. 31, 202 Cal. 606, at 609. A finding is also insufficient to support a judgment thereon where the finding, as such, merely states a general conclusion and leaves it doubtful what particular facts are established. 24 *Cal. Jur.* 964, note 16.

A. The statements in Finding IV to the effect that the Decree was not evidence against defendants herein, that it was not conclusive or binding on them or had no effect upon their rights, are all naked conclusions.

In *Wayte v. Patec*, 269 Pac. 660, 205 Cal. 46, at 53, a finding that a certain agreement "was a mere personal covenant and was not binding upon the assigns . . . nor the defendants" was held to be a mere conclusion of law, and as such was entirely ignored as a finding. The judgment based thereon was reversed.

The further statement in Finding IV that the decree was "not evidence against defendants" is a question of

law and not a question of *fact*. It has no proper place in findings of fact.

Said portion of Finding IV is further erroneous in that it applies the law of Germany, instead of the American law, in determining the evidentiary value and effect of the final declaratory decree.

We have heretofore shown by applicable authorities that the question of what is or is not evidence in an action is determined by the law of the forum. That law is clearly decisive on this question and the rule is that the said Decree is evidence for appellants and against the appellee. These authorities have been cited under point II of our argument.

B. Finding No. V in stating that Joe May did not acquire or succeed in the ownership of the Judgment, again merely states a conclusion of law purporting to state the *legal effect* of various transactions. Further, said "Finding" in the last sentence thereof states that certain facts upon which succession is claimed fail to transfer the judgment, but nowhere in said or any findings is there any definite reference to these facts, nor any description thereof, nor any finding as to their existence. Therefore said "finding" is too indefinite to be of any avail herein. The first portion refers to "transactions," the second part refers to "facts as a result of which" certain claims are made, yet neither portion definitely refers to either what those "transactions" or "facts" were, nor describes them, nor their existence. Therefore, and further, said "finding" is too indefinite to be of any avail.

It is well established that where a finding states that certain "facts" do not exist, or do not establish a given result, that such finding is defective in that it is not a finding of an ultimate fact, is a mere conclusion and leaves to inference or surmise what particular facts were established by the evidence, and for failure to find upon the issue of fact presented by the evidence the judgment must be reversed.

A finding that "the acts of the defendants alleged in the complaint did not inflict . . . grievous bodily injury . . ." is defective. *Franklin v. Franklin*, 74 Pac. 155, 140 Cal. 607, at 608. A finding that "all the material facts set forth in the complaint are true" is defective. *Ladd v. Tully*, 51 Cal. 277, at 278. A finding that "repeated acts of cruelty as established by the evidence" is defective. *Smith v. Smith*, 62 Cal. 466, at 468. To same effect, *Nelson v. Nelson*, 123 Pac. 1099, 18 Cal. App. 602.

In a mortgage foreclosure case the findings stated that the court did not find any balance due after deducting certain credits. This finding was held to be manifestly defective. (*Polhemus v. Carpenter, et al.*, 42 Cal. 375.) The court in that case (at 387-8) held: "The findings are so manifestly defective as to not require comment. Instead of stating facts involved in the issues, they contain only general conclusions drawn from the facts. They afford no information whatever as to the particular facts which the court considered established in the cause. The defendant was entitled to have more specific findings on facts within the issues, and on this ground the judgment should be reversed and a new trial awarded."

In all the above cases cited the courts held that such findings were too vague and indefinite, constituted mere conclusions, failed to find any particular facts, were clearly defective and insufficient and accordingly reversed the judgments.

Viewing Finding V in the light of the foregoing cases, it is clearly defective, in that it refers to undefined and undescribed facts as being insufficient to cause a result. The facts are not stated and are left to surmise. It cannot be ascertained from Finding V what facts were considered by the court as having been established, or what necessary facts were not found to have been established. It is similar to the cases cited *supra* in that it states that “the facts, as the result of which said acquisition or succession is *claimed to have resulted*, were and are insufficient . . .” Does this word “claimed” refer to the facts as claimed in the complaint? Does it refer to the facts *claimed* in the evidence? Appellees do not know and under the cases is entitled to know. It does not matter whether the facts the court so vaguely refers to, are those in the complaint or those in the evidence. Under the above authorities the finding is clearly insufficient, to support the judgment.

C. Finding No. VII is also subject to the same vice. It refers to “none of the transactions” and fails to define them or show what they were. It *concludes* therefore that such transactions did not have “the effect of transferring . . . the judgment . . .,” and fails to state what the transactions were. This finding also recites that “the facts as *the result of which it is claimed* Fritz Mandl did acquire . . . said judgment . . . did not have the

effect under the law of the German Reich of transferring . . . to . . . Mandl any part of the . . . title . . . of the Bank . . . in the . . . judgment.” The finding fails to state what the “facts” referred to were. Again the court leaves it to conjecture and surmise what “facts” it refers to. It cannot be ascertained what “transactions” or what “facts” the court considered as having been established or not established; whether Mandl failed to acquire the judgment because certain “transactions” or “facts” were not established or whether the “transactions” were established and the legal effect was found to be insufficient or whether appellants failed to establish certain “facts” or whether the facts were established but were insufficient as a legal conclusion.

D. Before concluding our argument on this point, we wish to call the court’s attention to the fact that Finding V directly contradicts the first sentence of Finding IV. The latter states that a German court of record rendered a declaratory judgment to the effect that the claim (judgment) was the personal property of Joe May, and not of Mayfilm Corp. and that *therefore* the assignment of said claim to the Bank by Joe May *was valid*. This refers to the final Decree that stated the correct German law on the point and the trial court’s finding thereon was correct.

But, notwithstanding the above finding of fact, the trial court, in Finding No. V, contradicts itself by stating that *according to German law* Joe May *did not* acquire or succeed to the ownership of the claim. The two statements are not reconcilable, for on the one hand we have

an actual adjudication that the judgment was “the personal property of Joe May” and on the other hand that Joe May was not the owner thereof.

E. Further, Finding III also contradicts Finding IV for in the latter the court finds *that under German law* there was an adjudication that Joe May and *not Mayfilm Corp.* was the owner of the judgment, and in Finding III the court finds that under German law the said “claim and judgment” “*were and at all times since have remained the property of Mayfilm Corp.*” These two findings likewise are contradictory of each other and irreconcilable.

Where findings upon an essential fact are opposed to each other the findings cannot support the judgment. *Moody v. Newmark*, 53 Pac. 944, 121 Cal. 446. They should be consistent. *Peak v. Republic Truck, etc.*, 230 Pac. 948, 194 Cal. 782; 24 Cal. Jur. 965-6.

The findings objected to are basic in that if any or all are found to be insufficient or defective, or contrary to each other the judgment based thereon cannot be sustained.

IV.

The Conclusions of Law Are Erroneous. (Specification 4.)

Conclusion of Law No. 1 [R. p. 39], to the effect that "Neither plaintiff or any of their predecessors in interest (other than Mayfilm A. G.) had or have any right, title or interest in or to the judgment sued upon, or in and to any part of the claim upon which said judgment was based," and Conclusion of Law No. 2 [R. p. 39] to the effect that "plaintiffs are not entitled to enforce said judgment" and Conclusion of Law No. 3 [R. p. 39], to the effect that "defendant is entitled to judgment, that plaintiffs take nothing and that defendant recover its costs" are, and each of them is clearly erroneous in that the same are (a) contrary to the evidence; (b) not supported by the evidence; and (c) contrary to law.

A. The evidence hereinbefore set forth, under Specification No. 2 shows that Mayfilm A. G. no longer was or is the owner of the judgment sued upon, or the claim upon which it is based; that the same was transferred from Mayfilm to Joe May firstly by purchase and assignment, and most certainly by the declaratory decree; that the same was assigned by May to the Bank and by the Bank to Mandl, and by Mandl to the Union Bank and by the Union Bank to the plaintiffs.

This has been fully discussed and analyzed under our argument on point No. II.

B. Said conclusions are and each of them is contrary to law in that they, and each of them, erroneously fail

and refuse to give any legal effect to the declaratory decree as *evidence* in this case; erroneously fail and refuse to give any legal effect to the actual assignment from the Bank to Mandl; erroneously fail and refuse to give any legal effect to the “notice” from the Bank to Universal as an equitable assignment under American law, or any effect under German law; erroneously interprets the German Code Law; fails and refuses to give any legal effect to the assignment from Mandl to the Union Bank or from the Union Bank to the plaintiffs; and lastly under the *evidence* in this case, and the law, the plaintiffs are entitled to judgment against defendant.

The law in respect to the foregoing, together with the applicable authorities have been fully set out in our argument under point No. II.

V.

The Judgment Herein Is Contrary to and Not Supported by the Evidence. (Specification 5.)

Since the grounds hereunder are the same as those set out under Specification No. 2 to show the several findings are contrary to and not supported by the evidence, in the interest of saving space, reference is hereby made thereto, and incorporated hereinunder.

The argument hereunder is the same as set out under point II, to which reference is respectfully made in the interest of saving space.

VI.

The Judgment Herein Is Contrary to Law. (Specification 6.)

The court: (a) erroneously held that the Decree constituted no evidence for appellants against these appellees. (Said Decree, by law, was *prima facie* evidence of muniment or link in the chain of or foundation of title and in the absence of evidence to the contrary (of which there was none), is conclusive on the defendant on the question of ownership as between the parties who litigated that question.) Furthermore, since appellee asserted that Mayfilm Corp. and not Joe May or his assigns was the owner of the judgment, and did not claim ownership in itself, the adjudication of the German Court in the declaratory Decree, determining that Joe May and not said Mayfilm Corp. was the owner thereof, and that his assignment to the Bank was valid, was and is binding and conclusive upon the appellee on the question of such ownership of the judgment sued upon;

(b) erroneously fails to hold that there was an actual assignment from the Bank to Mandl, or that there was an assignment by operation of law;

(c) erroneously held that the Kammergericht judgment was *res adjudicata* against appellants upon the question of ownership of the judgment sued upon;

(d) erroneously held that neither the appellants nor any of their predecessors in interest, other than Mayfilm Corp. have or had any title or interest in and to the judgment sued upon, or in or to the claim upon which it is based;

(e) erroneously failed to render judgment in appellants' favor for \$24,337.76.

The argument, including the law affecting each of the foregoing have been set out under point II. Reference is hereby made thereto.

VII.

The Court Erred in Restricting the Determination of Mandl's Rights With Respect to the Assignment From the Bank to Mandl to That Alleged in the Pleadings, To-wit: That of "Operation of Law" Only, and Further in Holding That the Measure of Said Rights Was Determined by the "Notice" From the Bank to Universal. (Specification 7.)

A. With respect to the pleadings: The court construed the pleadings to mean Mandl asserted his rights to the judgment by virtue of an assignment by operation of law *only* and restricted Mandl's rights accordingly. [R. p. 52.]

There was introduced by appellants proof of an actual assignment by the Bank to Mandl. [R. pp. 261-70.] No evidence to refute the actual assignment was offered by appellee. Appellants further urged that the notice from Bank to Universal was an equitable assignment which under American law transferred the claim and judgment to Mandl.

The court erred, in considering Mandl's rights, by failing or refusing to find on issues of equitable or actual assignment as shown by the evidence on the ground that such issues were not raised by the pleadings.

The amended complaint discloses that in paragraph V thereof [R. p. 7], "That notice of the payment of the obligation of said Joe May *together with the assignment from said Bank for Foreign Commerce of said judgment to said Fritz Mandl* was given to the defendant in a letter dated February 25, 1936, and mailed to the defendant, Universal Pictures Corporation, on said date by said Bank for Foreign Commerce." (Italics ours.)

Appellants submit that this allegation of the complaint was sufficient to raise the issue of either equitable or actual assignment.

But assuming that the court's interpretation of the pleading is correct, the court still erred in view of Rule 15B of the Federal Rules of Civil Procedure. In part it states, ". . . when issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised by the pleadings." The rule provides further that amendments to pleadings to conform to proof should be allowed, even after judgment and that failure to so amend "does not affect the results of the trial of these issues."

This rule is referred to by the commentators as creating an "automatic amendment" to the pleadings. In *Atwater v. N. A. Coal Corp.*, 111 Fed. (2d) 125, the court held, per Clark, J., that, "after trial judgment must be given according to the rights of the case whether the correct legal theory has been presented or not." To same effect are *Lintz v. Wheeler*, 113 Fed. (2d) 767 (C. C. A. 8); *United Clay Prod. v. Lender*, 119 Fed. (2d) 456; *Nesler v. Western Union*, 25 Fed. Supp. 478. Issues raised by the evidence and brought forward by the parties during the trial which are material to the issues involved must be considered by the court and *findings made thereon*. *Weiner v. Luscombe*, 66 Pac. (2d) 151, 19 Cal. App. (2d) 668, at 670; *Sun Maid, etc. v. Papazian*, 240 Pac. 47, 74 Cal. App. 231, at 238; *Wolf v. Gall*, 176 Cal. 787, 169 Pac. 1017.

When an issue involves an assignment, the pleadings relating thereto must be liberally construed with a view of

substantial justice between the parties. *Estate of Wickersham*, 96 Pac. 311, 153 Cal. 603; *McCaughey v. Shutte*, 46 Pac. 665, 117 Cal. 223.

B. Further, in construing Mandl's rights the court erred in limiting the same to the Bank's letter or notice to Universal. [R. pp. 32-3.] The court apparently regarding the notice in the light of a contract between Bank and Universal and therefore held parole evidence inadmissible to show the true transaction. The apparent ground of the court's ruling was that such parole testimony would nullify or change or vary the terms of the written notice. [R. pp. 402-3.]

First, considering this notice purely as such. It then was not such a document or contract as would come within the parole evidence rule. It was then merely a notice of an assignment, and not the assignment itself. Therefore it was susceptible of explanation by extrinsic circumstances or facts. The real transaction could be shown. This rule is stated in *First Federal Trust Co. v. Stockfleth*, 98 Cal. App. 21, at 24-5, (276 Pac. 371) thus: "Any writing which, neither by contract, operation of law, nor otherwise, vests, or passes, or extinguishes any right, but is used as *evidence of a fact*, and *not as evidence of a contract* may be susceptible of explanation by extrinsic circumstances or facts." (Italics ours.)

The same rule is stated in 31 C. J. S. "Evidence," page 851, paragraph 928; also in 22 C. J., page 1142, paragraph 1529. In *Porter v. Wormser*, 94 N. Y. 431, it was held that notices of sale sent by brokers to their principal are not writings of such a character as to preclude the admission of parole evidence to show the real transaction.

At pages 447-8 the Court of Appeals states, "It is insisted that those notices which the counsel characterize as 'purchase notes,' conclusively determine the point that the defendants were the purchasers of the bonds, and that parole evidence was inadmissible to show that they sustained any other relation to the transaction, or that in fact the bonds were sold to third persons. *We think the defendants were not precluded from showing the real transaction, and that the rules that parole evidence is inadmissible to change or vary written contracts have no application.*" (Italics ours.)

The *Porter v. Wormser* case, *supra*, and the case at bar have certain points of similarity. Wherein in the cited case the court held the notice was *not* such a contract as to come within the parole evidence rule, and did permit the real transaction to be shown, in the case at bar, the trial court held just the opposite and held the notice did come within the rule and therefore the true transaction could *not* be shown, to-wit: that the assignment from May to the Bank *therein set forth* was by way of security because the *assignment itself* did not show that fact. (The letter reciting the assignment did state that the assignment was "as security.") In the case at bar the evidence unquestionably shows that May's assignment to the Bank, though absolute on its face, was in fact, simply by way of security. It was admitted by appellee's witnesses as well as by those of appellants, that under German law a document which on its face was an absolute assignment, could be shown to be one given as security only. [R. pp. 401, 496-7, 411, 491.] This obviously could be shown by the law of the forum. *Shattuck and Desmond, etc.*

Co. v. Gillelen, 154 Cal. 778, at 784 (99 Pac. 348); *Golden v. Fisher*, 27 Cal. App. 271, at 280-81 (149 Pac. 797); *Renton-Holmes and Co. v. Monnier*, 77 Cal. 449, at 456-7 (19 Pac. 820).

The court, nevertheless, because of its strict adherence to the parole evidence rule, erroneously refused to give effect to or permit such testimony, and as a result found that no transfer by operation of law occurred. Had it done so, a different result would have obtained.

C. Appellants maintain, however, that the notice, by reason of its wording, must be construed as an assignment. The letter of notice sent by the Bank to Universal at New York on February 25, 1936, stated that the claim and judgment sued upon "has been transferred to . . . Mandl . . . of which fact we are notifying you herewith. You can satisfy this debt only by payment to the above named (Mandl)." [R. pp. 295-6.]

This notice admittedly received by Universal is in and of itself an actual equitable assignment, and had the effect of transferring as of its date, legal title of the claim and judgment to Mandl, irrespective of its additional recitations referring to an assignment by operation of law. Even in Germany this is recognized by the supreme code law, which states in section 409 thereof, that, "If the creditor inform the debtor that he has assigned the claim, the notice of assignment is valid against him as toward the debtor even though the assignment had not been made, or is not effective. It is equivalent to the notice that the creditor has executed an instrument of assignment to the new creditor named in the instrument and the latter pre-

sents it to the debtor . . .” [R. p. 439.] Where such notice is given by the *former* creditor it is not necessary for the new creditor to exhibit the assignment to the debtor and the latter must perform in favor of the assignee. [Sec. 410, German Civil Code, R. p. 440.]

In Germany, the Bank by its notice to Universal estopped itself from ever asserting the right to receive payment on the judgment. [R. p. 349.] Mayfilm Corp. is estopped to claim payment by virtue of the declaratory Decree. Joe May admitted he had assigned the claim to the Bank, so he is also estopped to claim payment. [R. p. 482.] This leaves only the appellants who are Mandl's successors in interest.

Heretofore under our argument on Point II we have set out the law to the effect that the question of whether the “notice” conferred upon Mandl the ownership of the judgment, so as to permit him or his successors as such owner to prosecute the action against Universal, must be determined by the law of the forum. We have also therein shown that under the law of the forum, to-wit: California, it is well settled that in order to constitute an equitable assignment no particular words are necessary, if, from the entire transaction it clearly appears that it is the intention of the parties to pass title. Any order, direction or request of a creditor to his debtor that the latter shall pay money due the former to a third person constitutes an equitable assignment and vests the ownership of the fund in the third person together with the right to prosecute the action for the recovery thereof. (Citations already set out in Argument under Point II.)

The "notice" clearly contained all the requisites necessary to establish it as an equitable assignment under California law. But, if it were to be held California law is inapplicable, then as the only alternative, New York law must be applied, for it was there the notice was directed by the Bank, and it was there admittedly received by Universal. New York was the domicile of the debtor: that is where the obligation to pay Mandl became fixed, and that is where payment (performance) of the judgment was contemplated under said notice. The "notice" may therefore be interpreted according to the law of the place of performance, to-wit: New York. (Calif. Civil Code, Sec. 1646.) Where an assignment is made in one place and to be performed in another, the law of the place of performance will control in determining the validity of the assignment, or whether an assignment exists. *App. of Goodchild*, 290 N. Y. S. 683; 160 Misc. 738; *Thompson v. Erie Rlwy.* 131 N. Y. S. 627 147 App. Div. 8; *A. B. T. v. Ann. Trust, etc. Bank*, 159 Ill. 467, 42 N. E. 856; *National Bank of America v. Ind. Banking Co.*, 114 Ill. 483, 2 N. E. 407; *N. W. Mutual Life Insurance Co. v. Adams*, 155 Wis. 335, 144 N. W. 1108. In the last cited case an assignment of insurance proceeds was made in Minnesota to be paid in Wisconsin. In Minnesota the assignment was void, but in Wisconsin it was valid. The place of payment or performance determined the applicable law and therefore the assignment was held to be good.

Under the law of New York the order, direction, or request of the creditor to his debtor that the latter shall pay the debt due the former to a third person constitutes an equitable assignment of the funds, and vest in the third person the ownership and the right to prosecute

the action against the debtor for the recovery thereof. The authorities in support of this rule have heretofore been cited under Argument, Point II.

The "notice" therefore under New York law clearly constituted an equitable assignment, which was sufficient to transfer the judgment sued upon to Mandl.

D. In addition to the foregoing reasons why the court should have found an actual or equitable assignment, we submit that where the assignor and the assignee each unequivocally recognize, admit and act on the premise that an assignment has been made, and each are satisfied with its validity, the debtor cannot question the validity thereof, or challenge its effectiveness as such assignment. *Dorner v. Heffner*, 15 Cal. App. (2d) 97, 101, 58 Pac. (2d) 1308; *Van Dyke v. Gardner*, 49 N. Y. S. 328, 22 Misc. 113; *Cornish v. Marty*, 76 Minn. 493, 79 N. W. 507.

Even where alleged creditors of the assignor would be allowed to challenge the assignment, this right is not allowed to the debtor. *Blackford v. Westchester Fire Ins. Co.*, 101 Fed. 90.

In conclusion, appellants submit there were three distinct assignments. First, the assignment by operation of law; second, an equitable assignment as set forth in the "notice" which under German law, California law or New York law was sufficient to transfer the judgment to Mandl; and third, *the actual assignment* as described by Mandl in his deposition, which has never been contradicted, refuted or denied. Therefore the court erred in restricting Mandl's rights to either the pleadings or the "notice" and should have made findings on the equitable and the actual assignments. Such findings if made should have determined that there was an assignment of the claim to Mandl and that he was entitled to sue thereon, and therefore the failure to make findings on such issues were prejudicial to appellants.

VIII.

The Court Erred in Denying Appellants' Motion for a New Trial. (Specification 8)

The court should have granted appellants' motion for a new trial on the following grounds:

(a) The judgment is contrary to the evidence. This has been fully presented in our argument under Point II to which reference is hereby made.

(b) The judgment is unsupported by the evidence. This likewise has already been argued under Point II to which reference is hereby made.

(c) The judgment is contrary to law. This has been set forth in Argument under Points II, VI and VII to which we respectfully refer.

(d) Errors of law occurring at the trial.

(1) The court erred in admitting opinions of experts in answer to *hypothetical* questions, for the purpose of showing that an *actual* German Declaratory Decree was *erroneous* according to German law. Said Decree determined Joe May to be the owner of the judgment sued upon. (Presented under Point I.)

(2) The court erred in restricting the determination of Mandl's rights with respect to the assignment from the Bank to Mandl to that alleged in the pleadings, to-wit: that of "operation of law" only. (Presented under Point VII.)

(3) The court erred in applying the "parole evidence rule" to the "notice" from Bank to Universal and in construing Mandl's rights under said "notice" by said rule. (Presented under Point VII.)

(4) The court erred in failing to give any evidentiary value to the Declaratory Decree. (Presented under Point II A.)

(5) The court erred in ruling on the issue of ownership of the judgment sued upon, that the Kammergericht "grounds of decision" were first a judgment, and secondly that they were *res adjudicata* against Joe May and his by operation of law, or by an equitable assignment or by an actual assignment. (Argued under Point VII.)

(6) The court erred in holding that there was no assignment of the judgment by the Bank to Mandl, either by operation of law, or by an equitable assignment or by an actual assignment. (Argued under Point VII.)

(7) The court erred in making findings of fact in the form of naked conclusions of law, or in such an indefinite manner as to leave in doubt what facts he did or did not find to exist. (Presented under Point III.)

(8) The court erred in making findings of fact that conflict with each other. (Presented under Point III.)

Each of the foregoing points has been argued at length heretofore, and it would be repetitious to reargue them here.

(e) Newly discovered evidence.

In support of the motion for new trial three affidavits were filed, to-wit: that of Mr. Hirschfeld of counsel, Mr. Taub, an attorney in New York, and of Mr. Lenk, an officer of the German Bank. Mr. Hirschfeld's affidavit shows: that Fritz Mandl had left Germany and had fled to Austria, at the time he engaged said counsel; that shortly thereafter, Mandl was forced to leave Austria and had not been heard from for a long time; that he finally appeared in New York via South America; that Mandl's German lawyers were, because of their faith, unavailable; that the preparation of the case for trial was without

benefit of either said German counsel or Mandl; that shortly before trial Mandl was located in New York and through one Leo Taub, a New York attorney, said Mandl's deposition was arranged for; that fortuitously one Erick Lenk, the officer of the German Bank who had handled the transaction with Mandl arrived in New York, and hurriedly arrangements were made to take his deposition; that by reason of the lack of information needed counsel instructed said Taub to question said witnesses on the general subject matter of the litigation; that only a few days before trial their depositions arrived; that counsel had little or no time to examine them and so advised the court; the court stated the case had dragged too long, was one of the oldest cases on his calendar and counsel interpreted the court's remarks as an order to proceed; that counsel had at no time before trial been informed of the existence of an actual assignment of the claim by Mandl by said Bank; that upon learning the court's decision, particularly with reference to his basis for decision concerning an actual assignment, said counsel ascertained from Lenk that there had been an actual assignment made by the Bank in addition to the one recited in the notice to Universal; that counsel thereupon obtained an affidavit from Lenk with reference thereto. [R. pp. 61-68.]

Said Lenk's affidavit shows that after Mandl paid the debt which was secured by the claim against Universal, it was Lenk's opinion that Mandl succeeded to the claim against Universal automatically and so advised them by letter to prevent them from paying anyone other than Mandl; that this notice was given pending the giving of

an actual assignment to Mandl; that subsequently after obtaining permission of the German Foreign Exchange Control office to execute a formal assignment, he personally prepared such assignment to Mandl, was signed by said Lenk, countersigned by another officer of the Bank, notarized, documentary stamps affixed and mailed to Mandl, and a copy was retained by the Bank. Said assignment in substance recited the prior assignment from May, described it, recited the loan by the Bank, the payment thereof by Mandl, recited the date and number of the Devisionstelle permit and concluded: “. . . We herewith transfer and assign this claim against Universal Pictures Corp., New York, to you.” Said Lenk stated he remembered the substance of the assignment as it was a general form used by the Bank for many years. He stated he did not volunteer anything about this assignment at the deposition as he was not asked about it. That he did not discuss the matter with Taub before giving the deposition and that Taub was unacquainted with those facts; that he was willing to testify to said facts in person. [R. pp. 72-77.]

Taub's affidavit discloses that after taking Mandl's deposition he went to Central America; that on his return he found letters from appellants' counsel urging the immediate taking of Lenk's deposition as the case was coming up for trial; he hurriedly took same, and delayed in sending both depositions to Los Angeles as he needed the exhibits of the former one in the latter. [R. pp. 69-70.]

It can thus be seen from said affidavits that counsel for appellants were under great difficulties in preparation of the pleadings and in preparation for trial. That further, the issue of actual or equitable assignment were first introduced during the trial. That only after the conclusion

of trial did counsel learn of the date and wording of an actual written assignment from the Bank to Mandl. That regardless of the court's opinion on the question of assignment by operation of law the affidavits disclosed said actual written assignment and in the interests of justice the court should have, on that ground alone, reopened the case for further evidence on that point or should have granted a motion for a new trial. In this way a determination of the issue of actual assignment could have been made

In determining the motion to grant a new trial, the court should be more liberal where such new trial will clear up an issue involving a plaintiff's right to sue than in cases where the additional evidence simply attempts to bolster up the merits of the cause of action itself.

We submit that a new trial should have been granted by the trial court.

Conclusion.

Appellants submit that the judgment herein, as it now exists, creates an unprecedented and impossible situation which only this Court can rectify. By a final Decree of a German court it has been finally determined that Mayfilm Corp. was not the owner of the judgment sued upon; but that the same was owned by Joe May, and that his assignment thereof to the Bank was valid. Such is the status of the judgment in Germany. The trial court, on the other hand, has determined that notwithstanding, Mayfilm Corp. is still the owner of the said judgment, that Joe May was not the owner, and that his assignment thereof to the Bank was ineffectual. Universal, nevertheless, admittedly owes the judgment to someone, but who this "someone" is, under the several conflicting judgments, cannot now be determined. Universal, now, can escape total liability, by using either of said judgments, as the

occasion may require. If it is sued by Joe May or his successor, it can use the judgment herein to claim that Mayfilm is the owner of the original judgment, while if action is brought by Mayfilm or its successor, it can set up the Declaratory Decree to support its claim that Mayfilm does not own the original judgment. Such a situation cannot continue to exist. We respectfully submit that the rights of the parties require, and that this Honorable Court should make a full determination of the evidentiary force and effect of the Declaratory Decree.

We further respectfully assert that the interests of the parties herein further require that there also be a full determination of the question of whether there was an assignment from the Bank to Mandl, either by operation of law, or by an equitable assignment, or by an actual assignment, for necessity requires that there be a determination as to where the ownership of the original judgment, admittedly owed by Universal, now exists. This question, too, we respectfully request, be fully determined by this Honorable Court.

In conclusion we respectfully submit that the record in this case is replete with prejudicial reversible error. It has been impossible to present all of them at length in this brief. We have, however, endeavored to point out those which in our opinion constitute the most serious. We sincerely believe we have done so. We therefore respectfully urge that the judgment be reversed, and that appellants be awarded all their costs on appeal.

Respectfully submitted,

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APPENDIX.

Chapman v. Moore, 151 Cal. 509 at 514-16 (91 P. 324) :

“Now, as to the effect of the decree. While respondent has contended here, though ineffectually, that the decree is void, he also insists that, even if valid, the trial court properly rejected it when offered as constituting a muniment of title in behalf of plaintiff against the defendant; that the decree was only conclusive against Patterson and parties in privity with him having notice of the judgment (Code Civ. Proc., sec. 1908, subd. 2), and did not affect the rights of the defendant Moore. And it is asserted by respondent in his brief that this was the view taken by the trial court. If so, it was incorrect.

“While the general rule undoubtedly is that judgments bind only parties and privies, still there is an exception to the rule universally recognized which sustains their admissibility against third parties who are not parties or privies to the judgments for certain purposes. This exception is that the judgment rendered in an action involving title to property, and in which it is determined that the title is in one of the parties to the action, is admissible in evidence in behalf of the party claiming under the judgment, and subsequently asserting a claim to the property affected by it as a link in his chain of title, although such judgment would not be conclusive on the party against whom it is offered because he was not a party or privy thereto. It is admissible in evidence, not for the purpose of defeating or affecting any claim or title of a party who was not a party or privy to such judgment, but solely as a muniment in an asserted title.

“In *Barr v. Gratz’s Executors*, 4 Wheat. 213, the rule is stated: ‘It is true that, in general, judgments or decrees are evidence only in suits between parties and privies. But the doctrine is wholly inapplicable to a case where the

decree is not introduced as *per se* binding upon any rights of the other party, but as an introductory fact to a link in the chain of plaintiff's title and constituting a part of the muniments of his estate. . . . To reject the proof of the decree would be, in effect, to declare that no title derived under a decree in chancery, was of any validity except in a suit between parties and privies, so that in a suit by or against a stranger, it would be a mere nullity. It might with as much propriety be argued that the plaintiff was not at liberty to prove any other title deeds in this suit, because they were *res inter alios acta*.' To the same effect are the cases of *Kurtz v. St. Paul and D. R. Co.*, 65 Minn. 60 (67 N. W. 808); *Gage v. Goudy*, 141 Ill. 215 (30 N. E. 320); *Railroad Equip. Co. v. Blair*, 145 N. Y. 607 (39 N. E. 962); *Bussey v. Dodge*, 94 Ga. 584 (21 S. E. 151); *Skelly v. Jones*, 70 N. Y. Supp. 447 (61 App. Div. 173). See, also, 24 Am. & Eng. Ency. of Law, p. 757; *Freeman on Judgments*, sec. 416.

"These authorities declare the exception to the general rule to be well established that a party claiming under a judgment is entitled to prove it as a muniment in his chain of title, and we content ourselves simply with a reference to them, as nothing to the contrary is cited by respondent.

"Applying this rule, then, to the effect of this judgment considered with the other proofs of title made by appellant, it is justified by the evidence. It was conceded on the trial that in 1887 the legal title to the lot in controversy was in Walter Patterson, and the presumption is that the legal title continued in him until it was shown that he had conveyed it, or that in some way it had become extinguished or his title defeated or barred. It was defeated and barred by the judgment obtained by Davis, the predecessor of plaintiff, against Patterson in 1894. As between these two it was there adjudged that the legal title, conceded, and theretofore presumed to continue, in Patterson, was,

as against him, in Davis, and such adjudication was as effective evidence of title to the property in the latter, and as conclusive of any claim of Patterson or his privies, as if Patterson had made him a conveyance of it by deed. A deed from Patterson to Davis would have been conclusive evidence against Patterson that legal title had in fact been transferred to Davis by him, and of course would be admissible as a link in the asserted claim of plaintiff of title to the property. So with the judgment. As it was as effective against Patterson's claim of title as if he had made Davis a deed to the property, it was, under the rule heretofore stated, admissible for the same purpose that his deed would have been—as a muniment of title. Being so admissible, it, with the previous concession of legal title in Patterson and the presumption arising therefrom, together with the conveyance from Davis to plaintiff, established in him *prima facie* title to the property, which in the absence of any evidence of title in the defendant would have warranted a judgment in his favor against the defendant Moore, and the finding of the court in the face of this *prima facie* showing that plaintiff was not the owner was not justified by the evidence."

Title Insurance Co. v. United States F. & G. Co., 121 Cal. App. 73, at 76-77 (8 P. (2d) 912):

"If, through either chain, Maybrook had become the owner at the time the policy of title insurance was issued, the judgment in this case must be affirmed. We shall therefore confine our further consideration to the second chain of title above outlined.

"When Daisy Grisham conveyed to Ramos Bros., Incorporated, it became the record owner of the property. If the judgment in the quiet title action brought by Maybrook against Ramos Bros., Incorporated, had the effect

of vesting the title of Ramos Bros., Incorporated, in Maybrook, this appeal must fail . . .

"Appellants' second point, that not being parties or privies they are not bound by Maybrook's judgment against Ramos Bros., Incorporated, is set at rest in this state by *Chapman v. Moore*, 151 Cal. 509 (121 Am. St. Rep. 130, 91 Pac. 324), and *Kipp v. Reed*, 183 Cal. 49 (190 Pac. 363). *The judgment obtained by Maybrook is as conclusive evidence against Ramos Bros., Incorporated, that title was in Maybrook, as if Ramos Bros., Incorporated, had given Maybrook a deed. Like a deed, it was admissible against appellants as a muniment of title to show that Maybrook through the judgment had acquired the title theretofore held by Ramos Bros., Incorporated.*

"Judgment affirmed." (Italics ours.)

Perkins v. Benguet etc. Co., 55 Cal. App. (2d) 720, 132 Pac. (2d) 70:

"The answer of defendant sets forth several defenses, most of them predicated on the contention that the dividends were payable to Mr. Perkins. It is important to note that defendant has never claimed, and does not now claim, any title to the stock, nor does it seek to show that anyone other than Mr. Perkins is entitled to the stock or dividends.

"At the trial of the present action *plaintiff offered no evidence of her title to the dividends except the judgment roll of the New York action.* Defendant's objections to the introduction of this record were overruled and *the New York record was admitted as competent and conclusive evidence of plaintiff's title.* Defendant made an offer to prove at the trial the allegations of its answer that the shares and the dividends belonged to the conjugal partner-

ship of plaintiff and her husband, and that, therefore, the dividends were payable to plaintiff's husband and his transferees. Defendant also offered to prove that, under the facts, Philippine law was applicable. The trial court sustained plaintiff's objections to such offers and *ruled that the New York judgment and every finding upon which it rests was conclusive against defendant with respect to everything therein adjudicated, i. e., res judicata in the same way as if defendant had been a party to the New York action.*" (Italics ours.) (P. 730.)

"On this appeal the basic contention of defendant is that the judgment of the New York court is not binding on it because, so it is urged, it was not a party or privy to a party to that action." . . . (P. 731.)

"It will thus be seen that in New York Mr. Perkins, in a forum of his own choosing, litigated the exact questions that defendant corporation seeks to litigate here. Every issue of fact and law that defendant corporation sought to raise in the trial court, except those later discussed, was litigated and passed upon by the New York Court of Appeals. The basic question now presented is whether defendant corporation should now be permitted to litigate those identical issues in California, or whether it is conclusively bound by the New York judgment under the doctrine of *res judicata*. *It should again be emphasized that defendant does not claim title in itself nor does it set up title in any third person. It claims the right to prove that the New York judgment was wrong and that in law and fact Mr. Perkins is entitled to the dividends on the stock—the very issue decided adversely to Mr. Perkins by the New York judgment.*" (Italics ours.) (P. 737.)

"It seems quite clear to us that as to the impounded dividends the corporation has no interest in this litigation separate from the interest of Mr. and Mrs. Perkins. It

claims no interest in the impounded dividends and sets up no interest of a third person. It simply claims that the dividends rightfully belong to Mr. Perkins, although, as between Mr. and Mrs. Perkins, it has finally been adjudicated that they belong to Mrs. Perkins. There are only two sides to this dispute over title to this stock, those of Mr. and Mrs. Perkins. The corporation's only interest is that it not be compelled to pay such dividends twice. As to such dividends, it is a mere stake-holder, a specialized form of bailee. If the New York judgment is binding on Mr. Perkins, if in an action brought by Mr. Perkins against the defendant for such dividends it can plead the New York judgment . . . the company is fully protected and should not be permitted to relitigate an issue which only involves Mr. and Mrs. Perkins, and which has already been passed on in New York. Inasmuch as it is our view that all these points must be decided in favor of Mrs. Perkins, it is our conclusion that, as to the impounded dividends, the New York judgment is clearly *res judicata* and binds defendant corporation although it was not a party to that action. . . .

"As already pointed out, in the New York action between Mr. and Mrs. Perkins it has been determined that Mrs. Perkins owns the stock and is entitled to the dividends thereon. . . .

"Once the competing stockholders have litigated the question of title to a final conclusion, payment by the corporation to the successful party in such an action must be a defense in an action against the corporation by the other party. (Bernhard v. Bank of America, 19 Cal. 2d 807 (122 P. 2d 892) (p. 738). Any other rule would lead to absurdities. Should the corporation be permitted in the present action to relitigate the title to the stock as between Mr. and Mrs. Perkins, in so far as the action involves its liability for impounded dividends, and should it obtain a

decision that it is not liable to Mrs. Perkins because Mr. Perkins is the owner, it would follow that in a suit brought by Mr. Perkins for the impounded dividends the corporation would be required to pay them to him. Otherwise, it would escape liability altogether. Mr. Perkins' obligation, if he recovered the dividends, would be to turn them over to his wife, since as between the two of them it has been held in the New York case that she is entitled to them. *Certainly, the company's interest not to be held liable twice for the dividends does not mean that it should not be held liable to one of the parties.* . . . (Italics ours.)

"It may be that a corporation in the position of defendant herein does not fit into definitions commonly given as to who is 'privity' to a judgment, so as to be bound by it although not a party. Where a situation arises which so obviously calls for application of the doctrine of *res judicata* as does the present case, in so far as it concerns impounded dividends, definitions of 'privies' and 'privity' drawn from other situations do not constitute an obstacle to reaching a sound result. In 1 Freeman on Judgments (5th ed.), page 893, section 409, is the following pertinent observation: 'The rule limiting the effect of a judgment to parties and their privies is not to be taken in an absolutely literal sense nor is it without important qualifications and exceptions.

"'Neither the benefit of judgments on the one side, nor the obligations on the other, are limited exclusively to parties and their privies.' 'The question of who is concluded by a judgment has been obscured by the use of the words, "privity" and "privies," which in their precise technical meaning (p. 739) in law are scarcely determinative always of who is and who is not bound by a judgment.'

"Defendant itself cites situations well recognized in the law where the relationship between the party sued in the

first action and the party sued in the second is such that the judgment in the first action is *res judicata*, and where, as here, the party sued in the second has no independent interest from that of the party sued in the first action. Thus, a landlord who defends through his tenant is conclusively estopped by the judgment (*Valentine v. Mahoney*, 37 Cal. 389); agents and servants are usually estopped by judgments against the principal or master (*Satterlee v. Bliss*, 36 Cal. 489); and a bailee by judgment against the bailor (*Hughes v. United Pipe Lines*, 119 N. Y. 423 (23 N. E. 1042)). The same reasoning applies to a stakeholder who is holding a fund as a disinterested party awaiting a final determination as to who, as between two disputing claimants, is entitled to the fund. As to such fund the third party, the corporation here, is a specialized form of bailee. *Every principle of reason, fairness, justice and equity compels the conclusion that it should be bound by a final judgment between the two disputing claimants.*" . . . (Italics ours.) (P. 740.)

"If a corporation has no adverse interest in an action between two disputants over title to its stock, it cannot gain such an adverse interest by choosing sides in the controversy and paying the dividends to one of the disputants with full knowledge of the other's claims. (Italics ours.)

"There is a remarkable paucity of authority on the subject under discussion. We have been referred to but two cases from other jurisdictions where the point here under discussion was directly involved. Both of them support the conclusions above set forth.

"*Hughes v. United Pipe Lines Co.*, 119 N. Y. 423 (23 N. E. 1042), was decided by the New York Court of Appeals. The facts were that William and Maria Stephans drilled and produced oil on land claimed by Hughes. The oil was stored by the Stephanses with the United Pipe Lines Company. Hughes notified the company that the

oil was his. The Stephanses sued Hughes to quiet title to the oil and Hughes secured an adjudication that he was the owner of the oil. The United Pipe Lines Company was not a party to that action. United Pipe Lines Company, with full knowledge of the dispute, took indemnity from the Stephanses and delivered the oil to them. Hughes sued the United Pipe Lines Company for conversion. The Stephanses were not parties to this action. (P. 749.) The trial court held that the judgment between the Stephanses and Hughes was conclusive on the issue of title as against the United Pipe Lines Company. This conclusion was affirmed, the court stating (23 (N. Y.) N. E. at p. 1043): 'The very matter in issue in that action was the title to the well, and the oil produced therefrom. To maintain their action the plaintiffs were bound to establish that the well and oil belonged to them, and the defendant in that action could defeat the same by showing that the well and oil belonged to him, and he prevailed upon that issue; and thus there was an adjudication, binding upon the plaintiffs therein, that they had no title to the well, or the oil produced therefrom, and that the same belonged to Hughes. The fact thus established could not again be brought in dispute between the same parties or their privies; and the judgment in that action conclusively established against the plaintiffs therein the right and title of Hughes to the well, and the oil produced therefrom. This defendant stands in the place of Stephans and wife. *It does not hold or claim the oil in its own right, but claims solely to hold it for Stephans and wife, by whom it has been indemnified against the claim of this plaintiff. The adjudication, therefore, which binds them, binds it; and this conclusion rests upon law so elementary that no citation of authorities to sustain it is needed.* It is clear, therefore, that the plaintiff is entitled to recover the value of this oil from the defendant. He early gave it notice of his claim. He

demanded the oil of it, and it refused to recognize his right.' (Italics added.)

"Defendant practically concedes that the second case—Commercial Nat. Bank v. Allaway, 207 Iowa 419 (223 N. W. 167)—decided by the Supreme Court of Iowa in 1929, is in point, its basic argument being that the decision is wrong. In that case, Allaway delivered his demand note to the Iowa Savings Bank. That bank pledged that note, together with others, with the Commercial National Bank to secure a loan. The Iowa Savings Bank failed, whereupon the Commercial National Bank sold out the pledge and purchased Allaway's note. The Iowa Savings Bank sued Commercial National Bank to recover the note, charging fraud in the sale, and its lack of authority to make the pledge. Judgment went for Commercial National Bank." (P. 750.)

"After that judgment became final, the Commercial National Bank brought the present action against Allaway on the note. Allaway's defense was that the Iowa Savings Bank was the owner of the note, and that he had paid that bank the full amount of the note. The Commercial National Bank pleaded the former adjudication as *res judicata*. The trial court decided against that contention. Thus, the situation is one where Allaway owed a debt and two banks claimed it. In litigation between the banks, to which Allaway was not a party, it was decided that bank A owned the note. Bank A sued Allaway and he defended on the ground that he had paid bank B, and that B, in fact, owns the note. The Supreme Court of Iowa, in reversing the trial court, held the prior judgment between A and B *res judicata* against Allaway on the issue of ownership, and that he could not (223 N. W., p. 168) 'have adjudicated, for the second time, a controversy that was settled by a former trial. . . .' That is exactly the legal situation presented in the instant case. In disposing

of the contention that the judgment was not *res judicata*, the court stated:

“‘So far, then, as the Iowa Savings Bank and its receiver are concerned, the adjudication certainly is complete. Can the appellee assert the fact thus found, in any way, that the Iowa Savings Bank and the receiver could not? Manifestly not, so far as the issues here involved are affected. Each assertion thus made by appellee must have been for and on behalf of the Iowa Savings Bank and its receiver, because the appellee was attempting in the trial below to prove that the appellant was not the real party in interest, by showing that truly and legally the Iowa Savings Bank and its receiver were such parties. To do this, it was necessary for appellee to become, for the time being, so far as his cause is concerned, the Iowa Savings Bank or its receiver.

“‘Hence, for all practical and legal purposes, appellee became the Iowa Savings Bank or its receiver, in order to plead their cause in the premises. A higher right could not accrue to the appellee in this respect than that owned and possessed by the Iowa Savings Bank and its receiver. Should appellee succeed, it must be on the rights and properties of the Iowa Savings Bank and its receiver in and to the note in question. Appellee himself had no property in this note, which is in the hands of an innocent purchaser for value, because he is the maker thereof, and not the owner. (P. 751.) The only interest he claims therein is the right to make an offset against it, providing the same legally again became the property of the Iowa Savings Bank. Clearly then, the adjudication which bound the Iowa Savings Bank and its receiver must of necessity, in the instance here under consideration, bind appellee, because appellee in this proceeding is simply reasserting the same rights, equities, and properties as those which were advanced in the former suit.

“ ‘Necessarily, in the present controversy, appellee must, in asserting his own claims, step into the position of the Iowa Savings Bank and its receiver, and there proclaim for them their (the Iowa Savings Bank and its receiver) own ownership of the note; for, if appellant is not the real party in interest, it is because that bank and its receiver owned appellee’s note.’ The court then went on to hold that the prior judgment between the two banks, so far as the issue of ownership of the note was concerned, was a conclusive ‘muniment of title’ which Allaway could not deny.

“The factual situations presented in these two cases are practically identical with that presented in the instant case. In both, prior to the second trial, the defendant had parted with money or property so that if the first judgment was binding on him, his sole recourse was to collect from the unsuccessful litigant in the first case. In both, the defendant in the second trial was not asserting his or a third person’s title, but was seeking to assert the title of the unsuccessful litigant in the first action. Those are the identical facts here presented.” (P. 752.)

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOHN LUHRING and MARGARET MORRIS, as joint tenants,
Appellants,

vs.

UNIVERSAL PICTURES COMPANY, INC., a corporation,
Appellee.

APPELLEE'S BRIEF.

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOHN LUHRING and MARGARET MORRIS, as joint tenants,
Appellants,

vs.

UNIVERSAL PICTURES COMPANY, INC., a corporation,
Appellee.

APPELLEE'S BRIEF.

General Considerations as to Appellee's Position and
the Questions Involved in This Appeal.

Appellants devote the major portion of pages 9, 10 and 11 of their brief to what they term "questions involved" and set forth twelve of such questions. It seems to us that the entire matter can be summed up substantially as follows:

In an action upon a judgment rendered by a German court, does the evidence support the findings of the trial court to the effect that as a matter of German law there was no effective assignment of the judgment from the judgment creditor to the plaintiffs' predecessor in interest?

In order to prevail at the trial plaintiffs had to prove a complete chain of title to the German judgment running from May Film¹ to themselves. According to appellants [Brief p. 3] the links in this chain were May Film to Joe May; Joe May to the Bank For Foreign Commerce; Bank For Foreign Commerce to Fritz Mandl; Fritz Mandl (through Union Bank & Trust Co. of Los Angeles) to plaintiffs.² If the chain broke at any point, plaintiffs' proof of title in themselves failed and their cause was lost. Of course, they are in no better position here as appellants.

As will presently appear, the evidence upon which the trial court based its findings shows that the chain broke in at least two places: the first, there was never any effective transfer from May Film to Joe May; the second, there was never any effective transfer from the Bank For Foreign Commerce to Fritz Mandl, even assuming that May had title and therefore effectively transferred to the Bank. Additionally, as will also presently appear, the very judgment in favor of May Film upon which appellants rely, rendered in an action to which appellee Universal was a party, conclusively adjudicated that Joe May was not the owner of the claim upon which the judgment was based. Since appellants claim by direct transfers stemming from Joe May, they are bound by that adjudication and as a matter of German law, as will be shown, they are estopped from contending as against Universal (appellee) that Joe May was the owner.

¹For brevity the German judgment creditor will be referred to herein as May Film instead of by its corporate name.

²No attack is made upon the assignment by Mandl, except that he had nothing to assign.

We shall remind the court that the law of a foreign country is a question of fact to be answered from the evidence in the record and that when any finding of the foreign law is supported by the evidence it is just as conclusive as any other supported finding of fact. The trial court found that under German law the chain of title was broken in the two spots referred to above. If the finding as to either break is supported it is enough, since one break is as good as many. Further, it will be shown that all of the findings are fully supported by the evidence.

After the judgment upon which this action was based became final, Bank For Foreign Commerce brought a declaratory relief suit against May Film which was represented by its liquidator. Universal was not a party to that suit and so far as the evidence discloses had no notice or knowledge of it. The judgment or decree in that suit declared that the judgment previously obtained against Universal was the personal property of Joe May and that his assignment to Bank For Foreign Commerce was legally valid. This is clearly set forth in the trial court's Finding IV [R. p. 36]³, in the case at bar.

Upon ample evidence of the German law, given by experts, the trial court found as a fact that the decree in the declaratory relief suit (to which Universal was not a party) was in no way binding upon Universal and was not evidence "of any of the facts or issues determined or purported to be determined therein." Thus, with no actual assignment from May Film to Joe May

³In the interest of uniformity, we shall follow appellants' plan of referring to the judgment sued on as "the judgment," the declaratory relief judgment as "the decree" and the Transcript of Record by the initial R.

and with no comfort to be drawn from the declaratory relief decree, appellants' claim to title to the judgment failed at the very outset.

Appellants, by their contentions in this appeal, have placed themselves in the middle of a dilemma from which there is no escape. As will clearly appear in our more detailed discussion and can be gathered from appellants' brief, most of the "evidence" of the substantive facts upon which plaintiffs at the trial relied to establish the allegations of their complaint relating to the assignment of the May Film judgment consisted of *recitals in the record* of the declaratory relief suit. Therefore one of two things is true: either those recitals are not binding upon appellee Universal because the latter was not a party to that suit and consequently furnish no evidence against Universal of the facts recited; *or*, the evidence of the experts as to the legal effect of the facts recited, assuming them to be facts, conclusively supports the trial court's findings as to the German law.

It will be seen that we never conceded that the recital of these matters in the judgment roll constituted any evidence of the facts but, since the roll was admitted in evidence, we drew from the experts their opinions on the assumption, but without conceding, that the facts were as recited.

Before we proceed to a more detailed discussion, with quotations from the testimony and citations of authority, it might serve a useful purpose to sum up in outline form the general considerations just advanced and which, despite the heavy fog cast about them in appellants' brief, determined the outcome of the case in the trial court,

and must, we respectfully submit, determine its outcome here.

- I. Appellants failed to prove that they own the German judgment.
 1. The judgment itself adjudicates conclusively that May Film is its owner.
 2. There was no effective transfer from May Film to Joe May.
 - a. There could therefore be no effective transfer from Joe May to Bank For Foreign Commerce.
 3. There was no effective transfer from Bank For Foreign Commerce to Fritz Mandl.
 - a. The assignment from Fritz Mandle to Union Bank & Trust Co. of Los Angeles and from the latter to plaintiffs therefore never became effective.
- II. The declaratory relief decree was not effective to vest title in Joe May as against appellee Universal.
 1. Universal was not a party to the suit and the decree was therefore in no way binding upon it or even evidence against it.
- III. Appellants are in a dilemma from which there is no escape.
 1. Since they must depend for their proof of facts upon mere recitals in a record to which appellee Universal was not a party, they cannot escape from the additional fact that under the German law the recited facts were insufficient to effect a transfer of title.

ARGUMENT.

1. The Trial Court's Findings Nos. III and V Are Fully Supported by the Evidence.

Finding No. III, in part, is as follows:

"Under and by virtue of the law of the German Reich said judgment [upon which this action is founded] and the claim on which it is based, were and at all times since have remained, the property of May Film A. G.; and in the German Reich and by virtue of the law of that country said judgment at all times since its rendition has been and is now enforceable against the judgment debtor, or its successor, only by May Film A. G., the judgment creditor." [R. p. 36.]

Finding No. V is as follows:

"Under and by virtue of the law of the German Reich said Joe May (the asserted predecessor in interest of plaintiffs herein) did not acquire or succeed to the ownership of any part of the judgment rendered in the action herein above in Finding III referred to, or to any part of the claim upon which said judgment was based. In that connection the Court finds that the facts, as the result of which said acquisition or succession is claimed to have resulted, were and are insufficient to have the effect, under the law of the German Reich, of transferring to or vesting in said Joe May any part of said judgment or of the claim upon which it is based." [R. p. 37.]

We shall undertake to reproduce, as briefly as possible, the evidence which shows that title to the judgment never passed from May Film to Joe May and, if it did so pass, was never transferred by Bank For Foreign Commerce

(an alleged holder of the title after May) to Fritz Mandl who was the immediate assignor, through a Los Angeles bank, of appellants.

The very judgment rendered by the German court, upon which this action is founded, adjudicated as follows:

“II) The Plaintiff is entitled to sue upon the claim. For its contention that this is not the case, defendant relies upon the testimony of the witness, Joe May, according to which he is alleged to have discussed and agreed, as stockholder, with the other stockholder, Aussenberg, that besides other assets the claim here sued for belonged to him, while the suit was to be continued by the Corporation May has, as he has stated, taken upon himself a deficit liability towards the liquidation creditors of an amount of 40,000 Rm.; he also claims to have paid 45,000 Rm. but states, on the other hand, that he would not be released from his liability even if the result of the present law suit should go into the liquidation assets.—According to this testimony, it must be assumed that the claim was not really ‘assigned,’ so that it was transferred from the corporation to one of the associates, May, but that the agreement between the associates was that after completion of the liquidation, the asset in question should be transferred to the associate, May, out of the remaining assets. It is supposed to have been especially agreed that the corporation should be authorized to continue the liquidation, and therefore be entitled to the proceeds of the law suit. The Plaintiff is the corporation, represented by the liquidator. Distribution of the assets of the corporation among the associates would be invalid as to him, before the corporation debts were

paid, because the associates are not authorized to divide among themselves the assets of the corporation, without taking care of the debts." [R. pp. 128-129.]

Thus, in the action to which appellee was a party, the German court found May Film to be the owner of the claim and entitled to sue upon it.

Dr. E. O. F. Golm was called at the trial by appellee, as an expert on German law. From 1904, when he began to study law in Germany until 1937 when he came to the United States, Dr. Golm had a varied experience as lawyer, judge and member of the government in Germany. His background is given on pages 310, 311 and 312 of the Transcript of Record.

Dr. Golm gave testimony which furnishes strong support for the trial court's findings III and V. This testimony appears on pages 316 to 328 inclusive, middle of page 333 to 337 inclusive, and pages 454, 455 and 456 of the Record. To save the court as much as possible from the annoyance of turning to the Transcript of Record and also because, as we think, the quotation of certain of the testimony here will have a tendency to clarify the issues, we reproduce the following from the evidence given by Dr. Golm:

"Q. Would an agreement between two stockholders of a company, in which between the two of them they owned all of the stock, with respect to the transfer or disposition of a part of the company's assets to one of the stockholders, have any effect as a transfer of those assets, in German law, without any act of the governing body in the execution of a document of transfer or assignment in pursuance of that

act? A. It would not have any effect in this meaning. It would create certain obligations between the two stockholders, but it would not have any effect binding upon a corporation or binding upon anybody else, as far as a transfer of this property or claim is concerned.

Q. Dr. Golm, for the purpose of expressing an opinion as to the German law I want you to assume certain facts to be true; assume them for the purpose of a question only. Let's assume that about the 10th of May, 1926 an American corporation enters into a contract with a German business corporation, which contract provided by its terms that it was to be governed by the laws of Germany, the contract further provided that in case of any violations of the contract the violating party must pay to the faithful party a contractual penalty of 50,000 marks. Prior to the year 1930 but after the contract was entered into the American corporation violated the contract, under circumstances entitling the German corporation to the contractual penalty of 50,000 marks. That an action was commenced in the Landgericht of Germany against the American corporation for the purpose of recovering and enforcing that contractual penalty of 50,000 marks. That on or about March 4, 1930 the Landgericht rendered a judgment that the German corporation was not entitled to recover the contractual penalty. That shortly after the rendition of that judgment and while proceedings to carry the case on in the Kammergericht were pending, two persons—we will call them, for the sake of our hypothetical question, Joe May and Julius Aussenberg; Joe May being at that time a sole stockholder of the German corporation which is involved in our hypothetical lawsuit—entered into an agreement by which Aussenberg agreed to buy a part of Joe May's stock

in the German corporation and they also agreed, as part of that agreement, that in return for 45,000 marks, contributed to the assets of the corporation by Joe May, certain of the property and assets of the corporation should be assigned to Joe May, and that included in the assets, which were to be so assigned under this agreement, was the claim of the German corporation against the American corporation for the 50,000 marks contractual penalty. Then let us assume that in due course the matter was heard and determined by the Kammergericht, which handed down the judgment on or about July 27, 1932, condemning the American corporation to pay to the German corporation the sum of 50,000 marks with interest in a certain amount. And let us assume that the judgment so handed down by the Kammergericht is the judgment of the Kammergericht which appears in this case as part of Plaintiffs' Exhibit 1, being the judgment in the action by May Film against Universal Pictures. That subsequently proceedings were taken by both parties, in the nature of a petition to the Reichsgericht, to review that judgment, which petition was rejected, so that the judgment of the Kammergericht became final. Assuming those facts to be true, do you have an opinion as to whether or not, under the law of Germany, the person we have referred to as Joe May acquired any interest in or title to the claim of the German corporation against the American corporation?" [R. pp. 316-318, incl.]

Appellants' counsel objected to the question propounded by appellee's counsel, one of the grounds of objection being that a further fact should be included in the question, namely, that "The board of directors, to-wit, the sole director, approved of the transfer." Thereupon, this

fact was added to the question and the witness permitted to answer. His answer follows:

“A. I understand the addition. The first part, assuming the facts given to me to be true, would be an agreement between—if it is permissible I would like to give the names of the two persons, Joe May and Aussenberg—by which agreement Joe May paid.

Q. Yes. A. The intention of this agreement was that he should acquire certain assets belonging to the corporation, and among them the claim in question against Universal. There can be no doubt, according to the German law, that an agreement of such kind could never bring about a transfer of such assets, particularly of this claim, because neither Aussenberg nor Joe May were entitled to dispose of the claim. The claim belonged to another person, a *persona juris*, the Aktiengesellschaft, which is entirely different from the individual stockholder. And, of course, this agreement is not without any value. It has to be interpreted as to the will of the contracting parties. And this interpretation would lead, in this special matter which you wanted me to assume to be true, would lead to the conclusion that the parties intended to say that one of the contracting parties, to-wit, Aussenberg, would no longer be interested in those assets, but that Joe May—

Mr. Blum: Your Honor, I don't want to interrupt—

Mr. Selvin: Then please don't. Let him finish his answer.” [R. pp. 321-322.]

“The Witness: Now, as I understand, I should furthermore assume the fact that the governing body consented to this agreement.

Q. By Mr. Selvin: Let me ask you about that.

The Court: He will ask the question, Dr. Golm.

Q. By Mr. Selvin: Let us assume this: In addition to the agreement of the stockholders, assumed in the prior question, that the governing body of the German corporation consisted of only one person, and in our hypothetical question let us call that person Johanna Loewenstein. Let us assume that Johanna Loewenstein knew that there was such an agreement between the two stockholders and that she had no objections to signing an intermediate balance sheet of August 15, 1930, which was after the date of this agreement between the stockholders, and agreed to the contents of the agreement between the two stockholders. And that in this intermediate balance sheet which she signed, and according to this intermediate balance, Joe May paid to the German corporation 45,000 marks, and there was assigned to him, in consideration, the assets, including the lawsuit against Universal Pictures. Assuming those facts, in addition to the facts previously assumed, would there be any difference in your answer? A. There would be a slight difference in the answer. Of course, this question couldn't be answered generally in an affirmative or a negative manner, because the assigning of a balance sheet, an interim balance sheet, as far as I understand, does not replace a real assignment. In order to make this transaction valid the governing body, in this case Mrs. Johanna Loewenstein, would have had to transfer the claim from the May Film Corporation to Joe May. However, if this claim was mentioned as to being transferred to Joe May in the interim balance sheet, and if Johanna Lowenstein as the only member of the governing body, did consent to this balance sheet, then it could be concluded, by means of interpretation also, that notwithstanding and apart from the foregoing agreement she wanted

to assign this claim to Joe May, and this assignment could be considered as valid. In order to answer the question completely I would have to see the balance sheet and the contents of it, because otherwise it couldn't be answered in a very decisive manner.

Q. But would this be true. That until such time as there was what you call a real assignment executed by the governing body of the corporation, would there have been effected, under the German law, any transfer to Joe May of the claim? A. No, it would not. The assignment of the governing body, the only organ of the stockholder company which has the right to dispose of the property, is indispensable for a transfer of a claim to a stockholder.

Q. Would the mere fact that the governing body knew that an agreement for such assignment had been made between the stockholders, and made no objection to it, take the place of a real assignment? A. The knowledge alone would not take the place." [R. pp. 322-324, incl.]

The reference to appellants' oral testimony on the subject appears on page 18 of their brief and has to do with statements made by the witness Heinz Pinner, an attorney in Berlin for Bank For Foreign Commerce. Dr. Pinner prepared the complaint in the declaratory relief suit and handled the case for the bank. [R. pp. 486-487.] The testimony of Pinner to which appellants call attention is as follows:

"A. From the facts I got, from the information I got, and from the complaint, I never had the slightest doubt but what there was a valid assignment. It was one of the best cases I ever had. I was convinced from the first moment that this complaint must be won in the court, because there was a valid assignment as to my opinion." [R. pp. 488-9:]

This witness seems to have based his opinion upon the complaint drawn by himself and information, the nature of which he did not disclose. One suspects that the declaratory relief suit was not very hotly contested. In this connection, the trial judge in the case at bar remarked: "I think counsel refers to a judgment to which Universal Pictures was not a party, which was sort of a friendly suit in which it was determined that Joe May was, in his individual capacity, the owner." [R. p. 319.]

In any event, the evidence offered by plaintiffs as to whether the German judgment was ever assigned to Joe May by May Film or ever became the property of Joe May, simply created a conflict in the evidence upon that subject. The trial court determined the conflict in favor of defendant Universal and carried that determination into the findings. Findings III and V are therefore unassailable.

2. Finding No. IV Is Fully Supported by the Evidence.

Failing to prove any effective assignment to Joe May of the German judgment, appellants at the trial made a vigorous effort (they make a truly desperate one in their brief on this appeal) to bring to their support the declaratory relief suit between Bank For Foreign Commerce and May Film, by its liquidator. In this suit (to which the trial judge in the instant case referred as "a sore of a friendly suit") it was adjudicated that Joe May individually owned the judgment against Universal. The entire proceedings in this case are included in the Transcript of Record as Plaintiffs' Exhibit No. 4, between

pages 217 and 241. The only witness testifying was Miss Johanna Loewenstein who gave her deposition at Hollywood, California. Her testimony appears between pages 235 and 238 of the Record. The German court said: "Proof for the allegation of the complaint has been made by this testimony, so that according to paragraph 256 of the Code of Civil Procedure, the prayer for declaratory relief must be granted." [R. p. 230.]

It should be noted that the purported facts relied upon by appellants in their effort to establish ownership of the judgment in Joe May, for instance those appearing on pages 16 and 17 of their brief, are not proven facts at all; they are simply recitals made by plaintiff in the declaratory relief suit and became no part of the court's decision. Aside from the consideration that appellee was not a party to that suit and is not bound by its decree, matters which appeared there only by way of recital can hardly be raised to the dignity in the instant case of proven facts.

Finding No. IV, which appellants attack, is as follows:

"On or about February 25, 1935 the Landegericht which was at the time a court of record of the German Reich, rendered a declaratory judgment, in an action in which the Bank For Foreign Commerce (Bank fur Auswartigen Handel A. G.), a German corporation, was plaintiff and May Film A. G. represented by its liquidator was defendant, declaring that the claim asserted in the action hereinabove in Finding III referred to was the personal property of one Joe May and not of May Film A. G. and that therefore, the assignment of said claim to said Bank for Foreign Commerce by said Joe May was legally

valid. Neither Universal Pictures Company, Inc. nor Universal Pictures Corporation was a party to said action of Bank for Foreign Commerce v. May Film A. G., or had or was given any notice or knowledge thereof. Under and by virtue of the law of the German Reich said declaratory judgment was in no way binding or conclusive upon either of the defendants herein, had no effect upon their or either of their rights in respect of the claim referred to in said judgment or in respect of the ownership of said claim, and was and is not evidence as against either of the defendants herein of any of the facts or issues determined or purported to be determined therein." [R. p. 36.]

The testimony of Dr. Golm which supports the finding appears largely between pages 335 and 345, both inclusive, of the Record. We quote here, in the interest of clarity as well as of emphasis, a short excerpt from the testimony:

"Q. Dr. Golm, using the term 'judgment in rem' in the sense of a judgment or decree, by a court, which is conclusive evidence against the entire world of the fact or facts which it determines or adjudicates, is there any such thing as that in the German law? A. I wouldn't say that there was no such thing in the German law, because there might be a judgment concerning the status of a person, such as whether a person is a legitimate child or whether a person is the child of a certain father. That would be binding upon everybody. And if you call that a judgment in rem I would say there is such a thing.

Q. Using the term 'judgment in rem' in the sense in which I have indicated, would a judgment in Germany between two parties, declaring one of them

rather than the other to be the owner of a certain claim, be a judgment in rem? A. There would be no doubt that it could never be a judgment in rem. Never, under no conditions.

Q. The judgment of the Landgericht, which is in evidence here as part of Plaintiff's Exhibit 1, that is the judgment between the Bank for Foreign Commerce and May Film— A. Yes, I know this judgment, because I translated it.

Q. In your opinion is that judgment a judgment in rem, using the term 'judgment in rem' in the sense which I have indicated? A. This judgment is a declaratory judgment which says that a claim, the claim against Universal, is owned by Joe May—or it says, 'Is hereby established that this claim is owned by Joe May,' it is rendered in a lawsuit between the Bank for Foreign Commerce and the May Film A. G., which was represented by its liquidator. It creates law only between the two litigant parties, and nobody else is bound to this establishment. It is a declaratory judgment which has effect only between the two litigant parties.

Q. Does that judgment have any effect, under German law, as in any way affecting or concluding the rights, duties or obligations of the claim respecting that judgment? A. No, it would not. And for my answer refer to the answer to the former question.

Q. Would that judgment in Germany have the effect of precluding or preventing Universal from contesting or challenging the fact of an assignment having been made? A. It would never prevent Universal from doing so.

Q. If I understand your opinion correctly, then, in so far as Universal is concerned, the question of

whether or not there was an effective transfer of the claim from May Film to Joe May is in no way concluded or affected by that judgment? A. This judgment concerns the relationship between the Bank for Foreign Commerce and the May Film A. G., and to that extent it establishes that the claim is owned by Joe May. That is the meaning of this judgment." [R. pp. 337-340, incl.]

Professor Max Radin, of the law school faculty of the University of California, gave expert testimony to the same effect. His direct examination begins on page 367 of the Record and so far as it pertains to the subject under discussion is as follows:

"Q. You are familiar, no doubt, with what in American law we call a judgment in rem? A. I am.

Q. Is there any equivalent or analogy to that in the German law? A. There are judgments dealing with the status of the family, covered by Book 6 of the Code of Civil Procedure of Germany. There are cases involving family status, covered almost wholly in Book 6 of the German Civil Code of Procedure, which are judgments in rem. Although that term is not used in German law to any extent, in so far as the status determined cannot be attacked laterally once it has been determined by the court. There is nothing corresponding to the judgment in rem involving ownership or obligatory transactions.

Q. Are you familiar with the judgment which is part of Plaintiff's Exhibit 3 and which we have referred to here as the declaratory judgment between the Bank for Foreign Commerce and May Film? A. I have read that judgment, the original and the translation.

Q. Using the term 'judgment in rem' as we use it ordinarily in American law, would you say that is a judgment in rem? A. If I may refresh my memory by looking at the last part?

The Court: Yes.

A. No, that is a declaratory judgment and, in my opinion, is not a judgment in rem.

Q. In your opinion, under German law, would that judgment have binding or conclusive force upon anyone not a party or a successor in interest to a party to that action? A. No.

Q. What generally is the effect of German judgments, from the standpoint of the American law which we call *res judicata*? A. They bind the persons who are parties and their privies. They bind no one who is not a party to the action.

Q. Is there, under German law, anything conclusive against one not a party to the action, or not a successor to the party to the action, as to the facts determined in that judgment? A. No. I may say this, since I am speaking as an expert witness all this is qualified by the term, in my opinion." [R. pp. 367, 368, 369.]

When appellants' counsel say (Brief p. 17 and in different language on page 19) that "the oral opinion of the experts for appellees included an *admission* that the declaratory decree established that the claim in question was owned by Joe May," they are being a trifle naive. Both experts, Dr. Golm and Professor Radin, made it quite clear that the declaratory judgment created law only between the two litigant parties and "nobody else is bound by this establishment"; that "German judgments bind the persons who are parties and their privies. They bind no one who is not a party to the action."

Dr. Heinz Pinner, one of *appellants'* witnesses to whom reference has already been made, gave testimony to the same effect as follows:

"The Court: Then, I take it, your answer is, it is not binding against third persons that are not before the court? A. No. In this case there is no doubt it isn't binding against anybody else but against the May Film, but it is—if I can explain it—evidence of title or proof." [R. p. 501.]

Appellee's position that the declaratory relief decree has no binding effect as against it receives support from another of *appellants'* witnesses, though appellants' counsel in quoting from the Record stop just short of giving us that fact. At the bottom of page 18 and top of page 19 their brief says: "Another of appellants' experts stated in response to a question as to the effect of the declaratory decree that: 'In a German case . . . such judgment would produce more than an assignment.' That such decree would have the effect of 'an assignment which has been confirmed by a court. In a case it would be evidence?'" The very next question (omitted from the brief) is:

"Q. Not conclusive on the third party, but evidence of an assignment?"

and the answer of the expert begins:

"A. Not conclusive, of course not, but another party would have to bring exact facts," etc. [R. top of page 531.]

Thus it appears that expert witnesses for both appellee and appellants gave evidence on German law which fully supports the trial court's finding No. V. Any tes-

timony in the Record in opposition to the opinion given by the witnesses from whom we have quoted, simply created a conflict in the evidence, a conflict which was resolved by the trial court against plaintiffs; appellants here are in no better position than they were in as plaintiffs at the trial.

3. Finding No. VI Is Fully Supported by the Evidence.

Earlier in this brief, in the section headed, "The Trial Court's Findings Nos. III and V Are Fully Supported By the Evidence," we reproduced a portion of the German court's judgment in the basic action May Film v. Universal, taken from pages 128 and 129 of the Record. This judgment declares that "The plaintiff (May Film) is entitled to sue upon the claim" and that "the claim was not really 'assigned,' so that it was transferred from the corporation to one of the associates, May" This adjudication is conclusive upon appellants and is carried into the trial court's finding No. VI, as follows:

"As part of its findings of fact made and entered in the action hereinabove in Finding III referred to, the Kammergericht found that the claim asserted in said action by the plaintiff therein had not been transferred to or acquired by Joe May, which said finding, under and by virtue of the law of the German Reich, was and is a conclusive determination of that issue as between Universal Pictures Corporation and its successors on the one hand and May Film A. G. and its successors or claimed successors on the other." [R. pp. 37 and 38.]

Since Joe May made himself a party in fact to that action by financing it [R. p. 230; Brief p .17] he and his successors are conclusively bound by the adjudication in that case. In other words, as between Joe May and his successors on the one hand and Universal on the other, the judgment of the German court (Kammergericht) that the claim against Universal *had not been assigned to May*, is a conclusive and final determination of that issue of fact. That would be the effect of such a judgment rendered in California and, therefore, that is the effect that must be given to a foreign judgment when brought in question here. (*Cal. Code of Civ. Proc.*, Secs. 1915, 1908(2); *Bates v. Berry*, 63 Cal. App. 505, 509; *Dobbins v. Economic Gas Co.*, 182 Cal. 616, 625, *et seq.*; *Calif. State etc. Bureau v. Brunella*, 14 Cal. App. (2d) 464, 466.) Furthermore, for the reasons given in the cited cases, as well as those indicated in *Williams v. Cooper*, 124 Cal. 666, 669 and similar decisions, the declaratory judgment in the later action to which Universal was not a party could have no effect as against Universal upon the prior judgment.

The first link in the chain upon which appellants must rely to prove their title to the German judgment has failed them. No actual assignment from May Film (the owner of the claim against Universal upon which the basic action was founded) to Joe May was made: the judgment in the basic action conclusively adjudicated that May Film owned and continued to own the claim; the experts on German law established as a fact that the declaratory relief decree had no effect upon the prior judgment and made no change in its ownership by which Universal could be affected.

Since Joe May never acquired the judgment, of course he could not make an effective transfer of it to the Bank For Foreign Commerce or to anybody else. However, since appellants contend that the bank acquired title to the judgment and passed it on to Fritz Mandl either by assignment or by "operation of law," we shall have to examine that contention. This brings us then to finding VII in which the trial court found that Fritz Mandl never acquired the title.

4. Finding No. VII Is Fully Supported by the Evidence.

The finding, which appears on page 38 of the Record, is as follows:

"Under and by virtue of the law of the German Reich none of the transactions had between or among said Joe May, Bank for Foreign Commerce and one Fritz Mandl had the effect of transferring to or vesting in said Fritz Mandl any part of the judgment hereinabove in Finding III referred to or of the claim upon which it was based, even if at the time of said transactions said Bank for Foreign Commerce acquired or was vested with ownership of said judgment or claim. In that connection the Court finds that the facts, as the result of which it is claimed Fritz Mandl did acquire or succeed to said judgment or claim, did not have the effect, under the law of the German Reich of transferring to or vesting in said Fritz Mandl any part of the right, title or interest of said Bank For Foreign Commerce, if any, in or to said judgment of claim." [R. p. 38.]

Assuming for the sake of the argument, that by some stretch of the imagination it can be said that at some

time or other, by one means or another, the Bank For Foreign Commerce had succeeded to the rights of May Film in the judgment against Universal, then by what means did the Bank pass on its rights to Fritz Mandl? The answer is that it did not pass them on.

Notwithstanding the statement of counsel on page 25 of their brief to the contrary, there was no competent evidence at the trial of an actual assignment from the Bank For Foreign Commerce to Fritz Mandl. The testimony to which counsel refer was obviously admitted by the trial court, over our objection, as preliminary to the introduction of a written assignment or of competent evidence of the contents of an assignment, whether written or oral. No such evidence was ever introduced. The proceedings were as follows, taken from the deposition of Fritz Mandl:

“Q. As a result of this payment which the bank obtained from you under your guarantee, do you recall that the bank gave you an assignment of a certain claim which they held against Universal Pictures Corporation, New York City, U. S. A.?”

Mr. Selvin: We object to that question on the ground that it assumes facts not in evidence, namely, that there was a guarantee, or that there was an assignment; upon the ground that it calls for a conclusion of the witness as to the effect of certain transactions.

The Court: Objection overruled.

Mr. Blum (reading):

A. Yes.

Q. Do you recall about when this was? A. Between 1932 and 1934.

Q. Have you got this document showing the assignment by the bank to you of their claim against Universal Pictures Corporation here? A. No.

Q. Do you know where this document is at the present time? A. No.

Q. Did you instruct the Bank for Foreign Commerce to notify Universal Pictures Corporation, New York, of the assignment? A. No.

Q. Do you know whether the Bank for Foreign Commerce notified Universal Pictures Corporation of New York City of the assignment of their claim to you? A. Yes." [R. pp. 264, 265.]

"Mr. Blum (reading):

Q. And the assignment which was made to you by the Bank for Foreign Commerce at Berlin, of a claim against Universal Pictures Corporation, was made after you had paid your guarantee to the Bank for Foreign Commerce in French francs?

Mr. Selvin: I object to that on the ground that it assumes facts not in evidence, namely, that there was an assignment from the Bank for Foreign Commerce to the witness, and secondly, that there was a guarantee, and further, it calls for a conclusion of the witness.

The Court: Objection overruled.

Mr. Blum (reading):

A. Yes." [R. p. 270.]

Upon this subject of an actual assignment the trial judge in his Memorandum Decision and Minute Order, said:

"The other question is: What rights were acquired in the judgment by Fritz Mandl through the guaranty he gave to the Bank of Foreign Commerce

of a debt of May Film Corporation, as security for which Joe May assigned the judgment in the main action?

“The measure of Mandl's rights is the bank's letter to the defendant, dated February 25, 1936. This letter states Mandl's rights as those of one who has become an assignee by operation of law only. Plaintiffs treated it as such in their complaint. Nowhere in the bank's letter, or in the complaint, is it claimed that the transaction was an actual assignment or an equitable assignment.” [R. p. 32.]

The letter to which the court refers was sent by Bank For Foreign Commerce to Universal and is reproduced on pages 295, 296 and 297 of the Record.

No proof of an actual assignment to Mandl was made. It is assumed that Mandl paid the debt to the Bank and the sole question is whether by this act, assuming it occurred, the judgment passed to him by operation of law. The *letter recites* [R. p. 296] that, according to paragraph 774 of the German Civil Code, the guarantor (Fritz Mandl) having satisfied the claim of the creditor the security for the debt passed to him. The rest of what appellants call a “Statement of Events” [R. p. 23] is taken from the *recitals* in the declaratory relief suit. Except for recitals and transcripts of testimony in a suit to which Universal was not a party, and *ex parte* statements in a letter, there was no competent evidence that there ever was a loan to May Film or that Joe May ever assigned anything to the Bank or that Fritz Mandl ever received an assignment. However, if these recitals be taken as establishing the facts, the one additional fact is that under the law of Germany (as will presently appear

from the expert testimony) they were insufficient to effect a transfer of title to Fritz Mandl. Here is another example of the dilemma in which appellants find themselves.

For the purpose of showing that no effective transfer of the basic judgment was ever made to Fritz Mandl, we shall assume that the *ex parte*, non-binding, incompetent recitals actually furnish evidence of the facts to which they relate. Even with this assumption, title to the judgment did not pass to Fritz Mandl for at least two reasons: (1) under the facts as recited there could be no transfer by operation of law, *i. e.*, payment of a debt did not automatically transfer the security to the person paying, according to the opinion of the expert witnesses; and (2) a valid assignment could not have been made without the written permission of the Board of Control of Exchange (Devisenstelle) which, so far as the record discloses, was never obtained. First, then, the expert testimony: Dr. Golm was examined at great length upon this subject, upon both direct and cross-examination. In effect, he gave it as his opinion that under the assumed facts, Fritz Mandl never became the owner of the German judgment. His testimony appears in the Record on pages 342 to 352; 359 to 361; 404, 405; 421 to 426; 440, 441; 464 to 468. It would extend this brief unduly to quote any considerable portion of it, either here or in an appendix. Therefore, we have selected a comparatively brief excerpt which serves to sum up pretty well the general tenor of his opinion.

“Q. (By Mr. Selvin): With respect to what passes to the paying surety, under those circumstances, is there any difference in the German law between a claim, let us say, which is given to the

principal creditor by way of lien, and a claim which is absolutely assigned to the principal creditor, but as security for the debt? A. There is a very decided difference, as laid down by the Supreme Court in a decision in Volume 89, in Section 774 of the German Civil Code.

.

A. This is the decision. It starts on page 193, and the part which I was referring to is on page 195.

The Court: Give us the substance of it.

A. The substance is that Section 774, which deals with a transfer by virtue of law to a paying surety, is not applicable in cases where there was not a security, a lien mortgage or other type of security, but a real assignment. And the decision states—and I may add that that is my opinion. I agree with this decision.—It states that in such case where there is a real assignment given by any kind of a guarantor, surety or debtor, but not a lien or other type of security, there exists only an obligation of the creditors after his satisfaction to reassign this claim or to transfer it to anybody else; but that there is never operation of law taking place, as in case of Section 774 and 401 and 426, which is quoted in 774. So it states that there is only an obligation. To answer Mr. Selvin's question, I would say that in this case, where there was a real assignment of a claim given by Mr. Joe May to the Bank, and the Bank was completely satisfied, the Bank was under the obligation to free this claim and to reassign it either to Joe May or maybe to Fritz Mandl, if the facts are correct, but that there was no operation of law transferring this claim to Mr. Mandl. It is different from the security mentioned in Section 401 and other security and the reassignment.

Q. (By Mr. Selvin): Referring once more to Plaintiffs' Exhibit 5, that part of it which consists of the letter of February 12, 1936, you will find there on the first page quoted what purports to be an assignment from Joe May to the Bank of the claim against Universal. A. They use the word 'abtretung.' The Latin word is 'cessio.' That means an assignment, or in German, 'abtretung.'

Q. What I mean, this letter quotes what the Bank says was such an assignment. Assuming that assignment was executed—and you understand it is my contention that that is no evidence of the fact that it was executed—but assuming that was executed, is or is not that a real assignment, as you have used that phrase in the answer last given? A. Yes, surely, because he says, 'I herewith assign the aforementioned claim based upon the judgment, to its full extent and with every interest or accessory claims, to the Bank for Foreign Commerce.'

The Court: Then, as I gather the substance of your statement relating to this, it is this: That Joe May, having made an actual assignment, as contradistinguished from any assignment by operation of law—A. Yes.

The Court: Then, before Mandl could acquire any right there would have to be a direct assignment from the Bank to him, and not a mere operation by payment of the debt; is that correct? A. That is correct, Your Honor." [R. pp. 352 to 355, incl.]

Professor Radin testified much more briefly but to the same general effect, *i. e.*, that under the circumstances assumed here, a claim would not pass by operation of law to a surety who paid the principal claim. [R. pp. 369 to 371.]

The expert testimony shows, practically without contradiction, that under German law, an assignment *as security* is a real assignment to be distinguished from an assignment as a pledge. [R. pp. 399, 401, 404, 405, 407.] The assignee, in the case of an assignment for security must return the security when the debt is satisfied. However, the security must be re-transferred or re-assigned to the debtor; it does not pass back to him by operation of law. Should a third party (in this case Fritz Mandl) pay the creditor, and be entitled to receive the security, the satisfied creditor must make an assignment in favor of the third party; no transfer by operation of law takes place. [R. pp. 354, 355 and 356.]

It will be remembered that, according to the recital in the letter to Universal [R. p. 296], which, of course, is not evidence of the fact, Joe May made an absolute assignment of the claim and judgment to the Bank For Foreign Commerce.

The German law experts testified that an assignment of the judgment by the Bank For Foreign Commerce, under the facts assumed in this case, would have been invalid without the written permission of the Devisenstelle, the German Board of Control of Exchange. There was no competent evidence that such a permission was ever given for the purported assignment to Fritz Mandl. [See Testimony of Dr. Golm, R. pp. 361 to 365, inclusive; testimony of Dr. Pinner, appellants' witness, R. pp. 501 and 502; testimony of Dr. Gebhardt, appellants' witness, R. p. 539.]

It thus appears that the Bank For Foreign Commerce never made an effective assignment of the judgment to

Fritz Mandl and if an assignment was made it was invalid without the permission of the Devisenstelle.

Having failed to establish that Fritz Mandl obtained title to the German judgment by *operation of law* (which was the only issue on this subject tendered by the amended complaint, R. pp. 6 and 7) appellants try to twist an *equitable assignment* out of the letters or notices sent by the Bank For Foreign Commerce to Universal in New York. (Brief pp. 62, 63 *et seq.*) The attempt goes beyond the issues as has been indicated. Furthermore, if a notice emanating from the Bank is to be treated as an assignment it is one by a German assignor to a German assignee, executed in Germany, relating to a claim founded upon a German contract executed and to be performed in Germany and reduced to a judgment in a German court. The judgment is for a sum of money in German marks and being a judgment of a German court, ordering payment to a German corporation, it was to be performed in Germany. In short, every material incident to the situation is referable to Germany and Germany alone. Manifestly, therefore, the substantive, legal effect of a document such as the one relied on must be decided by the law of Germany. The letter depended on as an assignment, so completely German in all its incidents, cannot be transformed into an American instrument because of the mere fact that it was mailed to a third party in America. Appellants' claim that the California law or New York law applies and that under either law the letter or "notice" was an equitable assignment, is clearly untenable. The legal effect of an assignment is determined by the law of the place of assignment. (*Restatement, Conflict of Laws*, secs. 348, 350; *Fenton v. Edwards, etc.*, 126 Cal.

43, 46-49.) Professor Radin testified that in Germany there is no such thing as an equitable assignment. [R. p. 378.] Dr. Golm testified that the letter or what counsel call the "notice" was not effective, under German law, as a transfer or assignment of a claim to Mandl against Universal. [R. pp. 348 to 352, incl.]

After plaintiffs had failed to vest title to the German judgment in Fritz Mandl by operation of law (under the allegations of the complaint) or by equitable assignment (which was outside the issues and also untenable) and the case had been decided against them, with commendable persistence and fortitude they made a motion for a new trial upon the ground of newly discovered evidence, claiming that an *actual assignment* to Fritz Mandl had been discovered. This motion was heard upon the affidavits referred to in Appellants' Brief, pages 86 and 87, and the counter-affidavit of Herman F. Selvin. [R. pp. 78 to 83, incl.] The trial court denied the motion and we can find nothing in the Brief or the Record to indicate that there was any abuse of discretion on the part of the court. It appears from Mr. Selvin's affidavit that due diligence was not used since the evidence was known at all times to Mandl, the real party in interest or to Lenk, one of plaintiff's witnesses, and could have been learned by counsel by simple inquiry of them. Under such circumstances the motion was properly denied. (*Marshall's etc. Supply v. Cashman* (C. C. A. 10), 111 F. (2d) 140, 142; *Warner Co. v. Orapello* (C. C. A. 3), 72 F. (2d) 373, 374; *Brea v. McGlashan*, 3 Cal. App. (2d) 454, 468; *Harrolson v. Barrett*, 99 Cal. 607, 610-11; *Estate of Cover*, 188 Cal. 133, 149-50.)

It also appears (Brief pp. 87 and 88) that the evidence of the contents of the purported written assignment was oral testimony given by one Erick Lenk, from memory, in an affidavit, the purported assignment itself not having been shown to be lost, destroyed or unavailable. The trial court was justified in viewing this testimony with that suspicion which courts frequently direct at alleged newly discovered evidence. (*Harrolson v. Barrett, supra; Tibbet v. Sue*, 125 Cal. 544, 548.)

The trial court's finding No. VII, declaring that Fritz Mandl never acquired title to the German judgment, is, we submit, amply supported by the evidence. Similarly, we have seen that the trial court is fully supported in its finding No. V that Joe May never succeeded to the ownership of any part of the claim or judgment against Universal and in finding No. IV that the declaratory relief "decree" was in no way binding or conclusive upon Universal or even evidence against it. Indeed, as is declared in finding No. VI, the German judgment upon which the action is founded, conclusively determined that the claim had not been acquired by Joe May.

As we stated at the outset, and undertook to show by the evidence, the chain of title claimed by appellants to run from May Film to themselves, through Joe May, Bank For Foreign Commerce and Fritz Mandl, failed in at least two places, and by reason of those broken links, judgment for defendant was a correct determination of the case.

5. A Short Resume of the Principles of Law and Authorities Applying to the Case.

(a) Under our procedure a plaintiff who sues upon an assigned claim must plead and prove the fact of assignment and it is always open to the debtor to show that no assignment was effected, either because no act of assignment took place or because what is claimed to be an assignment did not have that legal effect. (*Brown v. Curtis*, 128 Cal. 193, 195-6; *Bozard v. Dickenson*, 131 Cal. 162, 164; *Sterling etc. Co. v. Laher Co.*, 116 Cal. App. 100, 101; 6 C. J. S. 1184, Sec. 132.)

(b) A foreign judgment will be given the same effect in this state as it has in the country of its rendition. Its effect upon the rights and interests of the parties and their privies, therefore, is governed by the law of the country of rendition. (*Calif. Code of Civil Procedure*, Sec. 1915; *Restatement, Conflict of Laws*, Sec. 450(1); *Cuba R. R. Co. v. Crosby*, 222 U. S. 473, 478-9;⁴ *Fox v. Mick*, 20 Cal. App. 599, 602; *Title Ins. etc. Co. v. Cal. Dev. Co.*, 171 Cal. 173, 208; *Chapman v. Chapman*, 48 Kans. 636, 29 Pac. 1071; *Gobin v. Citizens etc. Bank* (Colo.), 20 P. (2d) 1007.)

(c) The validity and effect of an assignment are determined by the law of the place of assignment, which in this case was Germany. The fact that notice of the alleged assignment was given to Universal in New York

⁴Please see Appendix for quotation from opinion of Mr. Justice Holmes.

is therefore immaterial and the law of New York can have no bearing on the case. (*Restatement, Conflict of Laws*, Secs. 348, 350; *Fenton v. Edwards & Johnson*, 126 Cal. 43, 46-9; *Pritchard v. Norton*, 106 U. S. 124, 27 L. Ed. 104.)

(d) The law of a foreign country is a fact to be proved as is any other fact. It is not to be proved merely by the introduction in evidence of excerpts from its written laws, but should be proved by its merchants and lawyers. As against the evidence of experts who take into consideration all sources of that law, the bare language of a statute, without the gloss acquired from interpretation, practice and usage, raises no conflict. (*The Asiatic Prince* (C. C. A. 2), 108 Fed. 287, 289;⁵ *In re International Mahogany Co.* (C. C. A. 2); 147 Fed. 147; *Badische etc. Fabrik v. Klipstein Co.*, 125 Fed. 543; 4 *Wigmore on Evidence* (3rd Ed.) 546, Sec. 1271; 7 *Wigmore on Evidence* (3rd Ed.) 82, Sec. 1953.⁶)

Appellants make a valiant effort to apply American law to the question of the effect of the German declaratory relief decree and quote at length (their Appendix) from *Chapman v. Moore* and *Perkins v. Benquet etc. Co.*, California Supreme Court and District Court of Appeal decisions respectively. Even if it could be said that these decisions apply (which we insist is not so) such applica-

⁵Please see Appendix for quotation from opinion of Judge Lacombe.

⁶Please see Appendix for quotation.

tion would be merely to *one link* in the chain of title, the one vesting title in Joe May. There still remains the other broken link, the one by which Fritz Mandl *failed* to acquire title. Furthermore, these two decisions and others of the same kind cited by appellants are to be distinguished from the case at bar on the facts (the facts, for the most part, be it remembered, being non-binding recitals in the declaratory relief case) and the grounds for distinguishing them readily appear when they are read against the analysis of the trial judge in his memorandum decision in the instant case. The pertinent portions of this decision are as follows:

“What is attempted here is to bind the defendant by a judgment in an action to which it was not a party and which declared Joe May to be the owner of a judgment against it, in contradiction of a prior judgment, on the same issue, in the main action, in which it was a party, and of which Joe May, as assignee pending suit, had notice.

This, in effect, is not merely to give evidentiary value to and to receive the declaratory judgment as a link in a chain of title at the behest of one claiming a superior title against one claiming adversely to the title. But it is, in reality, to give to it binding effect on the defendant, who is challenging the right of one claiming to be its judgment creditor under the judgment of a court in a case to which it was not a party.

This cannot be done under the law.” [R. pp. 31, 32.]

6. Appellants' Criticism of the Trial Court's Findings Is Frivolous.

Appellants complain of findings Nos. IV, V and VII. The amended complaint tendered the issues upon which the trial court made the findings of ultimate fact, of which appellants now complain. Furthermore, as is shown under Division No. 5 of this brief, the law of a foreign country is a fact to be proved as in any other fact. By the testimony of the experts it was proved that as a matter of German law the declaratory relief judgment was not binding on Universal and was not evidence against it. These were facts of German law and the trial court so found. Appellants' counsel say (Brief p. 68):

“The further statement in Finding IV that the decree was ‘not evidence against defendants’ is a question of *law* and not a question of *fact*.”

True, it is a question of German law but it became a proven fact when the experts gave testimony concerning it and when the trial court accepted it as a fact.

Appellants complain that the findings refer to “undefined and undescribed facts as being sufficient to cause a result. The facts are not stated and are left to surmise.” It was not necessary for the court to find upon the probative facts from which it deduced the ultimate facts as to the effect of the declaratory relief decree, assignment by operation of law, etc. (*Klein v. Milne*, 198 Cal. 71, 75.)

Findings of foreign law such as those under attack here are not conclusions of law. They are findings of fact. (Cases cited *supra*.) Even as a general proposition of law they are sufficient as findings of fact and are not conclusions of law. (*Hick v. Thomas*, 90 Cal. 289, 296; *Weger v. Rotha*, 138 Cal. App. 109, 113.)

7. Appellants' Brief and the Position of Appellee With Regard Thereto.

The entire structure of appellants' brief, particularly in so far as it claims that the validity of Fritz Mandl's alleged title to the German judgment must be determined by the law of the forum, or of California or of New York, is built upon a false foundation. This becomes immediately apparent upon an examination of the citations given us on pages 63 and 64 of the brief.

At the bottom of page 63 it is said:

"The question of whether the 'notice' conferred upon Mandl the ownership of the judgment so as to permit him or his successors as such owner to prosecute an action against Universal *must be determined by the law of the forum.*" (Italics not ours.)

In support of this statement, *Jos. Dixon Crucible Co. v. Paul*, 167 Fed. 784, is cited and quoted from. The quotation (page 64) tells us that "the question raised by the defendant whether or not the assignment vests such title in him as to authorize the suit as brought, and to entitle him to judgment in that Court must be determined by the laws of Florida." (The forum.) As far as appellants'

counsel are concerned, the quotation is a half-truth. They neglect to tell us that the only question in the case was whether the assignee of a chose in action could sue in his own name or was required to sue in the name of his assignor. This was, of course, a procedural question and was decided by the law of the forum. Counsel next cite (Brief p. 64) *Pritchard v. Norton*, 106 U. S. 124, and state that it is "to same effect." Again, they neglect to tell us that the case does *not* hold that the effect or validity of an assignment is to be determined by the law of the forum, but only whether the assignee can maintain the suit in his own name. In fact the decision (p. 130) supports our position rather than that of appellants, of which fact, of course, counsel do not inform us. We take from the opinion the following language (p. 130):

"Whether an assignee of a chose in action shall sue in his own name or that of his assignor is a technical question of mere process, and determinable by the law of the forum; but whether the foreign assignment on which the plaintiff claims is valid at all, or whether it is valid against the defendant, goes to the merits and must be decided by the law in which the case has its legal seat."

Williston on Contracts, cited by counsel on page 64 of their brief, says:

"* * * Whether an assignee can maintain an action in his own name is held to be determined by the *lex fori*, and not by the *lex loci contractus*, a matter not of right but of remedy,' though the validity of the assignment is determined by the place where it is made."

The Restatement, Conflict of Laws, page 705, is also cited. This again has to do only with the procedural question and states:

“The law of the forum determines who may and who must sue and be sued.”

A more pronounced “inadvertence” of counsel in failing to give us the true import of a statement of the law comes in the quotation (also on page 64) from 6 Corpus Juris Secundum. Counsels’ quotation tells us that “it has been held” that the effect of an assignment is to be determined by the law of the forum—and stops. Actually, the quotation should have continued as follows:

“but there is other authority to the effect that the effect of an assignment depends on the law of the place of assignment.”

Because of the inadvertent character of appellants’ brief, we have not attempted to make a detailed refutation of its statements. This is not to be taken as an admission by us that the statements are correct. We consider that much of what is said in the brief refutes itself. We have rather chosen to present appellee’s position affirmatively and to point out the evidence and legal principles which support the trial court’s judgment.

Conclusion.

The law of Germany applies to the substantive questions involved in this case. The evidence as to the law of Germany, uncontradicted for the most part, is: (a) the substantive facts relating to the transfer of the claim from May Film to Joe May did not amount to a valid transfer of the judgment against Universal under German law; (b) the declaratory judgment was not binding on Universal in any way and was not even evidence against it of any of the facts determined by it or recited in the case; (c) there was no transfer by operation of law or otherwise from the Bank For Foreign Commerce to Fritz Mandl; and (d) nothing similar to our concept of "equitable assignment" existed in German law.

Appellants' argument, based as it is on American law, is beside the point.

The trial court's findings of fact are supported by substantial evidence and the judgment based upon them should be affirmed.

Respectfully submitted,

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APPENDIX.

Cuba R. R. Co. v. Crosby, 222 U. S. 473, 478-9:

“ . . . But when an action is brought upon a cause arising outside of the jurisdiction it always should be borne in mind that the duty of the court is not to administer its notion of justice but to enforce an obligation that has been created by a different law. (Case.) The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there. With very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. (Cases.) That and that alone is the foundation of their rights.”

The Asiatic Prince (C. C. A. 2), 108 Fed. 287, 289-90:

“Whether or not it is the law and usage in Santos is a question of fact, the burden of proving which is on the party asserting its existence. The law of a foreign country and its commercial usages are proved here by calling its lawyers and merchants and interrogating them. That has been done in this case, with a result which certainly warrants the conclusion that the proof is overwhelmingly the one way. It is true that as to the law of Brazil the only witness called by claimant was a young lawyer, but his statements are direct, positive, and reiterated. * * * There was abundant opportunity to take the testimony of some other lawyer in the District Court, if the statements of claimant's witness were inaccurate, and to make application here to take further proofs, but libellant has contented himself with printing copious excerpts from

the statute law of Brazil, which he insists do not sustain the witness' statements. * * * Such a method of criticising the testimony of a foreign lawyer as to the law which prevails in his country is unpersuasive; there is much more than the text of a statutory enactment to be considered; departmental regulations, administrative construction, judicial exposition are often quite as important."

7 *Wigmore on Evidence* (3rd Ed.) 82, Sec. 1953:

"No doubt has ever been made that properly skilled testimony may be sought in proving the existence of a foreign rule of law in general. The question that involves the present principle (opinion testimony) is: When the text for a statute is before the court, may an aid be received in construing or interpreting it? No one doubts that the aid of a mere translator is proper. But when a translation, if necessary, has been made, is anything further allowable in the way of comment on the text?"

"The answer has always and properly been that such aid may at any time be needed and may always be offered."

No. 10014

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOHN LUHRING and MARGARET MORRIS,
as joint tenants,

Plaintiffs and Appellants,

vs.

UNIVERSAL PICTURES COMPANY, INC., a
corporation,

Defendant and Appellee.

APPELLANTS' REPLY BRIEF.

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No. 10014

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN LUHRING and MARGARET MORRIS,
as joint tenants,

Plaintiffs and Appellants,

vs.

UNIVERSAL PICTURES COMPANY, INC., a
corporation,

Defendant and Appellee.

APPELLANTS' REPLY BRIEF.

Appellee, manifestly has been unable, and noticeably has failed to *answer* or *refute* appellants' authorities, contentions and arguments set forth in the opening brief, confessing thereby the weakness of its position herein and its inability to sustain the judgment. It is not *attempted* to answer Specification I, which discloses that the trial court *erred* in admitting testimony of appellee's witnesses to the effect that the declaratory decree, in their *opinion*, was erroneous.—a patent admission of error. Yet appellee blatantly has used this selfsame *inadmissible* evidence to support certain "findings" without which the judgment cannot be upheld. Appellee also has *ignored* the fact that the *record*—the declaratory relief action—*affirmatively discloses* that the claim against Universal was assigned by

Mayfilm to Joe May—the very fact which appellee's witnesses stated was *required to uphold* the Decree, and which, those *same* witnesses, in expression the *opinion* that the decree was erroneous, *expressly assumed was absent* therefrom. This, and similar examples, will receive further comment herein.

Reply to Appellee's Position and General Considerations.

The question involved herein cannot be reduced from appellants' twelve to the one stated by appellee. The sufficiency of the evidence is not the *only* issue herein, nor is German law *solely* involved. The *law of the forum*, and its *correct application*, must also be considered and determined upon this appeal. Neither does the evidence disclose any breaks in appellants' chain of title. That title is complete. It was the *erroneous* application of the law to the *evidentiary* effect of the Decree, and to facts disclosing an assignment from the bank to Mandl, which prompted the trial court to hold otherwise. Appellee's contention that the Kammergericht judgment adjudicated *between Mayfilm and Joe May* that May did not own the claim which resulted in that judgment, and that such determination was conclusive in *this* action, that Joe May never owned the judgment, is shown in both this and the opening brief to be without merit.

We neither deny nor dispute that *proof* of foreign law is a question of fact, but the *legal effect* of that law when proved, *is a question of law*. As correctly stated in *Cummings v. O'Brien*, 122 Cal. 204, 206 (54 Pac. 742)·

"It was competent to prove *as a fact* the law of that state (Texas) . . . though the *effect* of that law when proved, was a *legal question for the court*."
(Italics ours.)

Therefore any "finding" which *gives only the legal effect of*, but *does not state what the foreign law is*, is only a *conclusion of law*. Therefore the finding relied upon to nullify the decree (portion of IV) that under German law the declaratory decree was *not binding* upon Universal: had no *effect* upon its rights to or ownership of the claim, and was not evidence herein, reciting the *effect* of, and *not what the German law is*, can only be a *conclusion of law*, without findings of fact to sustain it. In *Kinnard v. Kinnard*, 45 N. Y. 535, the *effect* of, but not the foreign law *itself* was pleaded. The Court stated:

"That part of the plea . . . which alleges that defendant was *not bound* by the law, or in any manner subject to the jurisdiction of Massachusetts, is a *statement of law and not of fact* . . . It is a question of *law* whether he was *bound* by the laws of Massachusetts or subject to the jurisdiction of its courts." (Italics ours.)

The same vice permeates other vital "findings" herein (portions III and V, VI and VII) and destroys their efficacy as findings of fact.

Appellee has become enmeshed in the very web it seeks to weave for appellants. If the *recitals and facts* stated in the declaratory relief action are not evidence herein, then appellee's *opinion* testimony is *without foundation* and *becomes valueless*. If they are evidence (and the authorities so hold) then appellee is *conclusively bound thereby*, even though *not a party to that action*. Appellee *itself* does not claim title to, nor that some *third person* owns the German judgment. It asserts that *Mayfilm the unsuccessful litigant* in the declaratory action, *is still the owner* of the judgment, *notwithstanding the Decree* therein to the contrary. *Appellee therefore steps into the shoes of*, and is in no more favored position than, *Mayfilm*,

and like *Mayfilm* is conclusively bound by the decree. In *Perkins v. Benquet Cons. Min. Co.*, 55 Cal. App. (2d) 720 (132 Pac. (2d) 70)* plaintiff "offered no evidence of her title . . . except the judgment roll of the New York action" which was admitted as competent and conclusive evidence of plaintiff's title and the court "ruled that the New York judgment and every finding upon which it rests was conclusive against defendant with respect to everything therein adjudicated, i. e., *res judicata* in the same way as if defendant had been a party to the New York action." Additional authorities presently cited, also hold that "recitals" are evidence.

The outline of appellee's position (Br. p. 5) serves only to illustrate the error of its contentions. This is disclosed by the following:

- I. Appellants established their ownership to the German judgment.
 1. The declaratory Decree conclusively adjudicated that Joe May was the owner of the German judgment; that his assignment to the Bank was valid.
 - (a) The Kammergericht judgment did not adjudicate, as between Joe May and Mayfilm, that Mayfilm owned that judgment. But if it did, the Decree being later in time, and directly between the claimants themselves, must prevail herein upon the issue of ownership of the judgment.
 2. The Decree itself was effective as, and constituted a transfer of ownership of the judgment from Mayfilm to Joe May, and from him to the bank. (The judgment roll therein further dis-

*Hearing denied by Cal. Supreme Court; certiorari denied by U. S. Supreme Court, 63 Sup. Ct. 1435; 87 L. Ed. Adv. Op. 1369; quoted extensively in Appellants' Opening Brief, pages 4-12.

closes that Mayfilm assigned the judgment claim to Joe May, who assigned it to the bank.)

3. There was an effective transfer of the judgment from the bank to Mandl.

- (a) By actual assignment. (Mandl's undisputed testimony.)

- (b) By the "notice" from the bank to Universal, constituting an equitable and therefore actual assignment under the law of the forum.

- (c) By operation of law.

4. The subsequent assignments (Mandl to Union Bank to appellants) being unquestioned, completes appellants' chain of title.

II. The declaratory Decree was effective to vest title in Joe May as against Universal. Under appellee's contentions said Decree is *conclusive* against it, *even though Universal was not a party to that suit*.

1. Appellee stands in the shoes of Mayfilm, when it asserts that Mayfilm, *notwithstanding the Decree*, still owns the judgment, and *like Mayfilm, is conclusively bound* by the Decree.

2. The Decree is *evidence* against appellee as a conclusive "*muniment of title*" under the laws of the *forum*, which *governs* on matters of evidence.

III. The recitals of the *Decree* are evidence herein, and appellee is conclusively bound thereby.

1. Since appellee (by virtue of its contentions) is concluded by the Decree, every recital and finding upon which it rests likewise binds appellee, even though not a party thereto.

2. If the recitals are not evidence, then appellee's *opinion* evidence (even if admissible) is without *foundation*, and therefore *valueless*.

ARGUMENT, POINTS AND AUTHORITIES.

I.

The Evidence Does Not Support Findings III and V.

Appellee relies upon (a) the Kammergericht "grounds for decision," and (b) opinion evidence to uphold the aforesaid "findings" (finding III in part only is attacked) to the effect that Mayfilm still owns the German judgment. Such evidence is legally insufficient. (Op. Br. pp. 14-19, 45-49.)

A. The Kammergericht "grounds" do not adjudicate that Mayfilm owns the German judgment. (Op. Br. pp. 45-57.) The *actual judgment* [R. p. 120; App. p. 1] makes no such adjudication. The "grounds" are but the *reasons* for the judgment, and the *Kammergericht* "grounds" *never became final*. The Reichsgericht, in affirming the *judgment*, gave its own "grounds for decision" [R. pp. 177-196] which *superseded and nullified* the Kammergericht's "grounds." The *Declaratory action* expressly recognized this factor [R. p. 221] and applied a rule similar to that in California, *i. e.*, that the *law* stated in the Appellate Court's decision *cannot be accepted as final* after the Supreme Court takes over the case. (*Snoffer v. City of L. A.*, 14 Cal. App. (2d) 650, 653 (58 Pac. (2d) 961); *McDonough v. Goodcell*, 13 Cal. (2d) 741, 745 (91 Pac. (2d) 1035).)

Further, the *question* presented to the *Kammergericht* was "The defendant lastly objects to plaintiff being the proper party . . ." [R. p. 127], and that Court's answer thereto was "The plaintiff is entitled to sue upon the claim." [R. p. 128.] The "grounds", regardless of the broad language used, *must be interpreted in light of the question presented—proper party (and not ownership)—*

and in accordance with the rule stated in *Harder v. Denton*, 9 Cal. App. (2d) 607, 609 (51 Pac. (2d) 199):

“In determining the force and effect of a decision it is necessary to inquire into the questions which are presented for the court to determine. Frequently in an opinion by the court there is language which is simply the opinion of the writer thereof and does not decide the questions which are presented to the court and therefore does not become the law of the case which it decides.”

The Kammergericht “grounds” also *stated* and *assumed* an *incorrect factual* situation. Distribution of assets “*among* associates,” not a *sale* of assets for *cash* was therein considered; the *existence* of creditors and the *liquidation* of the corporation therein was *erroneously assumed*, and the statements therein were *dicta*. The foregoing matters and the *correct facts* were revealed, and successfully urged, in the Declaratory action. [R. pp. 220-224.] The following language in *Cor v. Tyrone Power Enterprises*, 49 Cal. App. (2d) 383, 397 (121 Pac. (2d) 829), is also most appropriate in construing the Kammergericht’s “grounds.”

“But it is a rule of construction that ‘a judicial opinion must be construed with reference to the facts on which it is based, the language used must be held as referring to the particular case, and read in the light of the circumstances under which it is used’ (21 C. J. S. 409). Particularly is it true that incidental statements of conclusions not necessary to the decision are not to be regarded as authority.”

It is also established that general language and expressions used in opinions are to be *considered, confined and limited* to the *particular facts* then before the Court,

and to the matters under consideration, and are not to be extended to cases where the facts are different. If they go beyond the case they do not control the judgment in a subsequent suit when the same point is again presented for decision. (*City of Pasadena v. Stimson*, 91 Cal. 238, 250 (27 Pac. 604); *Wood v. Roach*, 125 Cal. App. 631, 638 (14 Pac. (2d) 170); *Chapman v. State*, 104 Cal. 690, 697 (38 Pac. 457); *Ex parte Young Ah Gove*, 73 Cal. 438, 559 (15 Pac. 76).)

The Kammergericht "grounds" as a *matter of law* cannot constitute any adjudication herein upon the *issue of ownership* for the various reasons stated in the opening brief (pp. 49-57). As a matter of law and evidence, the subsequent Decree is conclusive herein upon the issue of ownership as between Mayfilm and Joe May.

B. Appellee's opinion testimony (Br. pp. 8-13) cannot support the findings. It is incompetent, legally insufficient, and without probative value. It was erroneously admitted over valid objection. (The primary objection—an attempt to impeach a final judgment [R. pp. 318-9, 334-5]—"inadvertently" is omitted from appellee's brief.) Appellee could not collaterally attack the Decree simply because Universal was not a party thereto [R. p. 320]. Mayfilm, admittedly could not do so, and no greater right accrued to appellee, who by asserting that Mayfilm still owned the judgment, despite the Decree, *stood in Mayfilm's shoes*. *Perkins v. Benguet*, *supra*, and other authorities cited in the opening brief are so conclusive of the foregoing that appellee has been unable to reply thereto. Dr. Gohn's testimony (even if admissible) simply states that an assignment of the claim from Mayfilm to Joe May was required to vest title in May; that with such assignment the transfer of the claim was valid and complete; that without it nothing passed to May. *The*

record herein—Declaratory relief action—however affirmatively states that Mayfilm actually assigned the claim to May. The “Facts” [R. p. 228] therein refer to, the “grounds for decision” [R. pp. 228-9] therein recited and the witness therein testified [R. p. 236] “It is correct that there was assigned to . . . Joe May . . . the claim against Universal . . .” Dr. Golm stated that “An oral assignment could be sufficient [R. p. 456]; “that it wasn’t necessary that it be written.” [R. p. 457.] *The Decree therefore is correct under German law under appellee’s own testimony.* Dr. Golm’s opinion (erroneously admitted over objection [R. pp. 334-5]) that the Decree was *erroneous, has no probative force and is without value as evidence herein.* Both the hypothetical question asked, and the answer given, expressly assumed the absence of facts existing in the record, i. e., that the claim was assigned by Mayfilm to Joe May. That opinion (even if admissible) is therefore governed by the rule stated in *Barnett v. Atchison Railway Co.*, 99 Cal. App. 310, 317 (278 Pac. 443): “The opinion of a witness upon assumed facts differing from those shown by the evidence cannot be given any probative force (*Estate of Purcell*, 164 Cal. 300, 308 (128 Pac. 932), and when such opinion is given in answer to a question which does not take the facts proved into consideration it is without value as evidence.” (Italics ours.)

To same effect *Estate of Purcell*, 164 Cal. 301, 308 (128 Pac. 932); *San Diego Land Co. v. Neale*, 88 Cal. 50, 63 (25 Pac. 977).

The trial court’s impromptu and highly irregular reference to the declaratory action “as a sort of friendly suit” not only was outside of any issue urged below, but is totally devoid of even a semblance of evidentiary support in the record. Certainly a contested suit between a liquidator and a bank over the ownership of a valuable asset

bears no earmarks of a "friendly suit." The exact converse is true. Appellee's constant reference to that remark cannot raise it to the dignity of evidence, nor can it support the "findings" assailed (Portion of III and V) which in fact are but *conclusions of law*.

II.

The Evidence Does Not Support Finding IV.

Only the latter portion of "finding" IV, wherein the court "found" that under German law the Decree was not binding upon Universal; had no effect upon its rights to or ownership of the claim, and was not evidence herein, is assailed. (Op. Br. p. 21.) Appellee's own testimony (Br. pp. 16-19) *affirmatively shows* that *under German law*, the Decree although a *declaratory judgment*, and not a "judgment in rem," nevertheless was binding, effective, *res judicata*, and created law between the litigant parties, i. e., Bank and Mayfilm, and that it established that the claim against Universal was owned by Joe May. This, as a matter of law, destroys the questioned portion of the finding. The added statement that the Decree concluded only the parties and their privies, is immaterial, for the effect of the Decree as evidence against appellee, is governed not by German law, but by the law of the forum. (See Op. Br. p. 46.) This was recognized below. When inquiry was made as to the evidentiary value of the Decree in Germany, appellee's counsel objected "that German procedure was not applicable to this action. The court replied: ". . . by the doctrine of conflict of laws, the effect to be given a judgment of a foreign court is determined by the law of the forum and not by the court which rendered the judgment. In other words, it is determined by the law of California, not by the law of the country where it was rendered." [R. p. 500.] (Italics ours.) Again the court stated (referring

to the effect of the Decree): “. . . but it seems to me it is a matter of evidence that can be determined by California law.” [R. p. 481.]

Yet in making the finding *German procedure* and not *California law* was applied. Under California law, the Decree was evidence against the appellee as a “muniment of title.” Where, as here, appellee asserted that Mavfilm, the unsuccessful party to the Decree, still owned the German judgment, appellee like Mayfilm, was concluded by the Decree, and by every finding and recital upon which it rested. (See Op. Br. pp. 46-48.) Further, under California law, the *recitals* of the Decree are evidence herein. *Perkins v. Benguet, supra*; *Page v. Garver*, 5 Cal. App. 383, 385 (90 Pac. 481), states: “. . . , we are nevertheless of the opinion that where a collateral attack is made, the *recitals* contained in the judgment are *sufficient evidence of the matters therein recited*. The judgment may be grossly unjust or erroneous, but the decision of the court as to all issues involved in the action stands as a finality between the parties and their privies until set aside in some mode recognized by law. (*Jones on Evidence*, Sec. 601.) In such case, where the judgment is one rendered by a court of general jurisdiction, the *recitals* contained therein constitute evidence of their truth and every intendment must be indulged in support of the judgment.” (Italics ours.) *Simmons v. Threshour*, 118 Cal. 100, 101 (50 Pac. 312) states: “As the record offered . . . was competent evidence of the final adjudication . . . , so its recitals . . . were evidence of the facts recited; . . .” In *Estate of Hunsicker*, 65 Cal. App. 114 (223 Pac. 411) it was held that the contents of a document attached to the petition in an adoption matter and the *recitals* in the Pennsylvania decree supplied the necessary evidence of jurisdictional facts urged therein to be lacking.

Even under German law, the Decree was evidence. It was "evidence of title" [R. p. 501], "more than an assignment," "an assignment which had been confirmed by a court," and required independent facts showing title elsewhere to overcome it. [R. p. 531.] Such was appellant's testimony and appellee offered *no evidence* upon *that subject*. Appellee neither had, nor asserted any rights to or ownership of the judgment, so that portion of the "finding" also is unsupported. The assailed portion of "finding" IV cannot be sustained. It is also but a *conclusion of law*.

III.

The Evidence Does Not Support Finding VI.

Both the opening brief (pp. 49-51, 20-21, 14-15) and Point IA herein, disclose that Kammergericht "grounds" as a *matter of law* cannot sustain this finding for the following reasons: (a) said "grounds" *never became final but were superseded by the Reichsgericht "grounds"*; (b) "proper party"—not ownership—was the issue therein determined; (c) said "grounds" *assumed an incorrect factual situation, i. e., distribution of assets among associates—not a cash sale; the existence of creditors, and the liquidation of the corporation*; (d) it *assumed* but did not actually *decide* that the claim had not been transferred; (e) the statements relied upon are "dicta"; (f) Mayfilm and Joe May were not *adverse* parties therein, therefore no adjudication of ownership *as between them*; (g) which is also true even if Joe May, as a purchaser became a party thereto; he still was not an *adverse* party to Mayfilm; (h) even if the "grounds" were an adjudication, the

later Decree, being inconsistent therewith, would prevail herein on the issue of ownership; and (i) this *subsequent* decree *transferred* the ownership to Joe May and nullified the "grounds" as *res judicata* on the issue of ownership herein; and (j) the interpretation of the "grounds" by the *German* court in the Decree should have been followed and adopted by the trial court; *besides it was the only German law on the subject*. The foregoing contentions are supported by unchallenged authorities (Op. Br. pp. 49-57) and remain unanswered. Nor do appellee's authorities sustain the finding. The rule that an assignee *pendente lite*, participating in the suit of an assignor, is bound by the result, has no application. The Kammergericht "grounds" for the reasons stated could not adjudicate the ownership of the claim *as between Mayfilm and Joe May*. But if it did, that ownership *at any time after that judgment* could be transferred from Mayfilm to Joe May, either by assignment, or involuntarily by decree of court, and such after-acquired title would defeat the prior adjudication. The subsequent Decree herein was effective as such transfer and *nullified* the prior adjudication, if any, on the issue of ownership. In the *Williams* case the plaintiff therein, against whom the judgment was offered, *claimed title in himself*. Appellee herein *claimed title in Mayfilm, the unsuccessful party to the decree*. This distinction is clearly defined in *Perkins v. Benguet, supra*. Besides *Scott v. Wardin*, 111 Cal. App. 587, 594 (296 Pac. 95) held that the *Williams* case did not conflict with nor was it contrary to the "muniment of title" rule. Finding VI is both unsupported and contrary to law.

IV.

The Evidence Does Not Support Finding VII.

The evidence of *actual* assignment (Bank to Mandl) was competent and sufficient. Appellee's objections thereto were without merit. From the questions asked (no objection as to form) and the answers given it is crystal clear that after Mandl paid upon his guarantee, the bank assigned the claim against Universal to him. (Appellee's witness admitted that the bank was obligated to assign the claim to Mandl [R. pp. 354-6] who was entitled to receive it. [R. p. 371].) Appellee made no attempt by cross-examination, or otherwise, to disprove *this* assignment, nor to inquire into the mechanics or formality by which it was made. Similar evidence, to which identical objections were overruled, has been upheld (*Bank of Italy v. Bettencourt*, 214 Cal. 571, 575-6 (7 Pac. (2d) 174)) and judgment has been reversed for failure to give effect to like evidence. (*Brown v. Patella*, 24 Cal. App. (2d) 362, 363 (75 Pac. (2d) 119).) Any error or uncertainty as to date of said assignment is immaterial. The *fact* of assignment, and *not* the *date* thereof, *governs*. (*Binford v. Boyd*, 178 Cal. 458, 464 (174 Pac. 56).) This evidence is particularly sufficient since appellee is *fully protected*, both *under German and American law*, from *further claim by or liability to the Bank*. The "notice" from the Bank [Pl. Ex. 11, R. pp. 295-7] under German law, Sec. 409 [R. p. 439; also Golm's testimony, R. pp. 349, 428] completely protects the appellee from "double" liability, and under American law, it constitutes an "equitable assignment which affords the same full protection. The appellee's rights are therefore governed by the following rule stated in *Bartlett Estate Co. v. Fraser*, 11 Cal. App. 373, 376 (105 Pac 130): ". . . appellant is fully protected from further litigation or liability in con-

nection with any claim of the bank on the paper, *and this should be the full measure of his right to enforce proof of assignment, or to question its validity.*" (Italics ours.) (See also Op. Br. pp. 67, 84.) It is also significant that prior to suit appellee denied liability *solely on other grounds.* [Pl. Ex. 13, R. pp. 520-22; Deft. Ex. B, R. p. 308.]

Neither was it necessary to produce the original assignment. No objection was interposed on that ground, nor was that the *basis* of the Court's decision. Besides, its whereabouts was unknown. [R. p. 264.] Wherever it was, it is clear from the testimony [R. p. 262] that it was *outside the jurisdiction* of the Court. Secondary evidence therefore was proper. (*Mackroth v. Sladky*, 27 Cal. App. 112, 119 (148 Pac. 978); *Zellerbach v. Allengberg*, 99 Cal. 57, 73 (33 Pac. 786); *Gordon v. Searing*, 8 Cal. 49; *Burton v. Driggs*, 20 Wall. 125, 134, 22 L. Ed. 299, 302; 20 *Am. Jur.* 386, par. 434.)

Appellee relies solely upon the trial court's *opinion* to sustain its contention. Obviously no other supporting authority can be found. Point VII of the Opening Brief (pp. 74-84) has demonstrated said opinion to be so clearly *erroneous* that further discussion would be but repetition. Clearly Mandl's rights could not be restricted solely to an "assignment by operation of law" under the *issues tried* and the *evidence presented* in this case. The trial court was duty bound to determine *upon the merits all issues presented*, including the one of *actual assignment*. (Op. Br. pp. 78-9.)

Appellee also *incorrectly* has stated the record herein. There is *testimony* herein (independent of the recitals) that Mandl paid the debt to the *Bank* [R. pp. 262-3, 270, 281, 290-1]; that there was a loan to Mayfilm [R. pp. 273-4, 279-80, 288]; that Joe May assigned the judg-

ment to the Bank [R. pp. 482, 280-1, 289]; and that Fritz Mandl received an assignment. [R. pp. 263-4, 270.] Further, despite appellee's unsupported claim, the *recitals* of the *Declaratory suit* are evidence in this case, and must be so considered. (*Perkins v. Benquet, supra; Page v. Garter, supra; Simmons v. Threshour, supra; Estate of Hunsicker, supra.*)

Appellee relies upon (a) opinion evidence and (b) a claim that no Divisenstelle permit was obtained to sustain its contention that there was no assignment by operation of law. Neither position is sound. Appellee attempted to offset the *written German law* (Sec. 774, where a guarantor satisfies the creditor the latter's claim is transferred to the former [R. p. 250], and Section 401, that with the claim so transferred any security given and the rights appertaining thereto are likewise transferred [R. p. 251]) with opinion testimony to the effect that an actual assignment was required to vest title in Mandl. (There was an actual assignment.) The entire evidence on that subject, and the fallacy of appellee's contention, is fully treated in the Opening Brief (pp. 25-32, 57-61) and need not be repeated. The testimony quoted by appellee (Br. pp. 27-29), as well as that *immediately following* [R. pp. 355-6] discloses that: ". . . the Bank was under obligation to assign this claim, after the Bank was satisfied, to Mandl who paid . . ." and, that the witness' *opinion* to the effect that an actual assignment was required, was based upon an *inapplicable* case, which itself does not support the witness' construction thereof. (See Op. Br. pp. 27-30.) The evidence herein further revealed that in banking transactions, by virtue of "commercial usages and custom"—those very usages and customs which appellee's case, *The Asiatic Prince*, stated must be considered in construing foreign law—an actual assignment was not required, but that the claim and the

security passed from the Bank *by operation of law to the party entitled thereto.* [R. pp. 443, 493-4, 532-3.] This was never denied. Therefore appellee's opinions, based upon an inapplicable case, and giving no consideration to "commercial usages and custom" is *without value as evidence.* (*Barnett v. Atchison Ry., supra; Estate of Purcell, supra; San Diego Land Co. v. Neale, supra.*)

The record herein further discloses that the Divisenstelle permit *was obtained.* Dr. Lenk so testified in his deposition as follows: "Q. Did you, on behalf of your bank, obtain a promise from the Foreign Exchange Control Office in Berlin for the transfer and assignment of the judgment obtained by May Film A. G. against Universal Pictures? . . . A. I did." [Rep. p. 383.]

Upon cross-examination further inquiry was made, and explanation given concerning the permit, and the details thereof. [R. pp. 284-5.] The testimony also disclosed that the original was in the archives of the Bank in Germany, and *outside the jurisdiction* of the court. [R. p. 284.] The evidence therefore was proper and sufficient. (*Mackroth v. Sladky, supra; Zellerbach v. Allengberg, supra; Gordon v. Searing, supra; Burton v. Driggs, supra; 20 Am. Jur. 386.*)

Further, appellee's counsel stated that he had, but refused to stipulate that it was, a copy of the permit, together with its translation. It therefore could not be used. [R. pp. 286, 539-40.] Under such circumstances Sec. 1963, subd. 5, of the Cal. C. C. P. is most applicable.

Besides, both Dr. Golm [R. p. 364] and Dr. Gebhardt [R. pp. 540-1] testified that if permission was obtained to apply a French franc account to the payment of a debt, that no *further* permission was necessary to assign or transfer the judgment to a national of another country. The one permit was sufficient.

The evidence discloses that Mandl's French franc account at the Bank was used in payment of his guarantee [R. pp. 262, 281]; that the bank belonged to the Divisen Bank and was under strict governmental control. [R. p. 501.] Therefore, even if the record fails to disclose (which it does not) that the Divisenstelle permit had been obtained, appellee does not benefit thereby, for then the following presumptions of Sec. 1963, Cal. C. C. P., *would apply, and supply the necessary evidence, i. e.*, "that the law has been obeyed" (subd. 33); "that official duty has been regularly performed" (subd. 15); "that private transactions have been fair and regular" (subd. 19); "that the ordinary course of business has been followed" (subd. 20); "that a person is innocent of crime or wrong" (subd. 1). In *H. D. Haley & Co. v. McVay*, 70 Cal. App. 438, 440 (233 Pac. 409), it was urged that because there was no proof that plaintiff, a foreign corporation, had qualified to do business in California, that the contract sued upon was void. The Court held that the presumption, "that the law has been obeyed," supplied the necessary evidence, and the validity of the contract was upheld. Also, to the same effect: *In re Sterling*, 96 F. (2d) 616; *N. L. R. B. v. Sterling*, 109 F. (2d) 194, 205; *Miller v. Solomon*, 100 Cal. App. 756, 762 (279 Pac. 660); *Borges v. Pac. Greyhound*, 10 Cal. App. (2d) 450, 453 (51 Pac. (2d) 1146); *Brill v. Brill*, 38 Cal. App. (2d) 741 (102 Pac. (2d) 534).

It is also well established that the questions of presumptions are governed by the *law of the forum*. (*Sayles v. Peters*, 11 Cal. App. (2d) 401, 407 (54 Pac. (2d) 94); 78 A. L. R. 884; *Restatement—Conflict of Laws*, 710, par. 595; 11 *Am. Jur.* 522.) The foregoing presumptions are therefor all applicable herein. For the foregoing reasons it follows that appellee's "Divisenstelle argument" is without merit.

Appellee's contentions as to "equitable assignment" likewise are untenable. The amended complaint sufficiently tendered that issue. Paragraph V [R. p. 7] states: ". . . That notice of payments . . . together with the assignment (the "notice" involved) . . . was given defendant . . ." In California it is not necessary to allege the facts concerning an equitable assignment in order to raise that issue. (*Puterbaugh v. McCray*, 25 Cal. App. 469, 472 (144 Pac. 149); 3 Cal. Jur. 302.) Besides, the issue of equitable assignment was actually tried during the course of the trial, so whether that issue was within the pleadings was immaterial. (Rule 15b, Fed. Rules, Civ. Proc.) The Court should have determined that issue *upon the merits*. (Op. Br. pp. 77-78.)

Appellee's contention that German law governs the interpretation of the "notice" as an assignment is both legally and factually incorrect. Contrary to appellee's statement (Br. p. 31) this assignment was made by a *German* assignor to an *Austrian* citizen (before the Anschluss) [R. pp. 272, 296, 361], as assignee, and transferred a German judgment *out of Germany* with the permission of the Divisenstelle to make such transfer, to a national of another country, residing outside of Germany. It involved the obligation of an *American debtor*, residing in New York, the place where the "notice" was delivered and received; where payment on behalf of the Austrian was demanded, and where payment was to be made. The "notice" expressly directed the *American debtor* to pay the *Austrian* assignee, and *not* to pay the *German* assignor. Under such circumstances, how can it be said that the judgment was to be paid in Germany, and that German law governed Mandl's right to receive the money. If so, why all the argument about the necessary for the Divisenstelle permit? Its very purpose was to *permit payment to be made outside of Germany to a person, not*

a *German national*. It becomes obvious that the effect of the "notice" as an assignment must be governed by American law. This is particularly true when we consider that it is the established rule that a debt, for the purpose of collection, is always ambulatory, and accompanies the person of the debtor. (11 *Am. Jur.* 381.) Either California or New York law applies in determining the legal effect of the "notice" as an assignment. In both places it is the law that said "notice" was an equitable assignment and constituted Mandl the legal owner of the judgment. These rules and the applicable authorities are fully set forth in the Opening Brief (pp. 63-67, 82-84).

There is no merit to the claim that appellants' motion for new trial was properly denied, because Dr. Lenk in his affidavit stated from memory the contents of the written assignment from the Bank to Mandl, without a showing that the original itself had been lost, destroyed or unavailable. The copy of which Dr. Lenk spoke was in Germany, *outside the jurisdiction* of the Court, and unavailable. The original had been sent to Mandl in Vienna, who had testified that he did not know where it was, but probably in Vienna among his papers. Mr. Hirschfeld's affidavit showed that Mandl was forced to leave Austria. [R. p. 63.] Since both the original and copy of said assignment were outside the jurisdiction of the Court, the assignment was within the rule of "lost documents," and secondary evidence of its contents was admissible without further foundation. (*Mackroth v. Sladky, supra*; *Zellerbach v. Allengberg, supra*; *Gordon v. Searing, supra*; *Burton v. Driggs*; 20 *Am. Jur.* 386.)

Appellee's further contention that due diligence was not used is without merit. Mr. Hirschfeld's affidavit further discloses the various difficulties encountered in this suit; that the depositions of Mandl and Dr. Lenk actually were not received until the date of trial and that their contents were unknown until trial; that Mandl's whereabouts were on most occasions unknown and that Dr. Lenk's presence in America was only discovered shortly before trial. The denial of the motion was erroneous, and Finding VII is unsupported by and contrary to the evidence.

V.

The Material "Findings" Are Conclusions of Law.

Appellants' contention cannot be summarily dismissed as appellee seeks to do. The "findings" herein assailed—portions of III (Op. Br. p. 14), and IV (Op. Br. p. 21) and all of V [R. p. 37], and VII [R. p. 38]—are clearly conclusions of law. They cannot be upheld as "ultimate facts." These "findings" purport to give the *legal effect* of the German law, *but do not state what that German law is*. Such findings of foreign law are clearly insufficient. Cases dealing with the insufficiency of pleadings which give the legal effect of, but do not state what the foreign law is, have been before the courts repeatedly. The courts have consistently held that such pleadings are only *conclusions of law* and *not statements of fact*. These authorities are especially pertinent herein, because the sufficiency of a finding and the sufficiency of a pleading are governed by the same rules. (*Carpenter v. Froloff*, 30 Cal. App. (2d) 400, 407 (86 Pac. (2d) 691) states:

"The sufficiency of the findings of fact to support a judgment is tested by the same rules that are applied to test sufficiency of a pleading to state a cause of action." Also, *Clarke v. Standard Acc. Ins. Co.*, 43 Cal. App. (2d) 563, 570 (111 Pac. (2d) 353); *County of San Louis Obispo v. Gage*, 139 Cal. 398, 409 (73 Pac. 174); 24 Cal. Jur. 969.

It is not sufficient in a pleading to merely state the effect of the laws of a foreign country, but such laws must be pleaded as facts are pleaded, and must state what the laws are, and not what the effect of such laws may be, or what the rights of the parties are under them.

In *Grand Lodge etc. v. Clark*, 189 Ind. 373 (127 N. E. 280) [see App. p. 2], the effect, but not the Ohio law itself was pleaded. In holding such pleading insufficient, the Court said: "*He does not state what the laws are, but he states what . . . is the effect of those laws. It is not sufficient in a pleading to state the effect of the laws of a sister state but such laws must be pleaded as facts are pleaded, and must state what the laws are and not what the effect of them may be.*" (Italics ours.)

In *McDougald v. Rutherford*, 30 Ala. 253, 257 [see App. p. 2], it was alleged that by the laws of Georgia, McDougald became liable to pay the money set forth in the note. Demurrer was overruled. Reversing the judgment, the Court stated: "*The declaration does not state what the law of Georgia is or was, but states a conclusion as to the effect of that law and as to the rights and liabilities of the parties under the law.*"

In *Rothschild v. Rio Grande W. Ry. Co.*, 59 Hun. 454 (13 N. Y. Supp. 361) [see App. p. 3], the Court states:

"The demurrer is upon the grounds that the laws of Colorado and Utah are facts which must be pleaded and that the bare allegations that under these laws the liabilities of consolidated companies became attached to defendant and enforceable against it, is insufficient to constitute a cause of action. We think the demurrer was well founded. The allegation is not a statement of fact, but of a legal conclusion from undisclosed facts. . . . The law of a foreign state is a fact to be alleged and proved like any other facts." (Italics ours.)

In *Kinnier v. Kinnier*, 45 N. Y. 535 [see App. p. 4], it was alleged that according to the laws of Illinois and the practice of the Court, and in consequence thereof, the Court could not entertain jurisdiction of the case. Also, that the judgment was void in Illinois. The Court stated: *"These are statements of law, not of fact, and the sufficiency of the pleading is to be determined by facts stated not by conclusions of law averred. In Starback v. Murrey (5 Wend. 159) Marcy, J., said: 'That part of the plea in this case which alleges that the defendant was not bound by the laws, or in any manner subject to the jurisdiction of Massachusetts is a statement of law and not of fact. . . . It is a question of law whether he was bound by the laws of Massachusetts or subject to the jurisdiction of its courts.'"* (Italics ours.)

If in the foregoing cases the word "findings" were substituted for "pleadings," we would have the exact case at bar. The following cases [see excerpts therefrom in the Appendix, pp. 4-10] are to the same effect: *Wilson v. Clark*, 11 Ind. 385; *Lomb v. Pioneer Sav. & L. Co.*, 96

Ala. 430, 434 (11 So. 154); *Temple v. Brittan*, 11 Ky. L. Rep. 467 (12 S. W. 306); *Gibson v. Chicago Ry. Co.*, 225 Mo. 473 (125 S. W. 453); *Bank of Commerce v. Fuqua*, 11 Mont. 285 (28 Pac. 291); *Jenness v. Simpson*, 81 Vt. 109 (69 Atl. 646); *Lotery v. Moore*, 16 Wash. 476, 479 (48 Pac. 238); *Saving v. Kargas Furn. Co.*, 150 Mo. App. 574 (131 S. W. 153); *Templeton v. Sharp*, 10 Ky. L. Rep. 499 (9 S. W. 507); *Stockham v. Simmons*, 67 Ill. App. 83; *Pearce v. Rhaven*, 13 Ill. App. 637, 640; *Cubbedge H. & Co. v. Napier*, 62 Ala. 518.

Applying the rule of the foregoing cases to the “findings” in question, it becomes crystal clear that they cannot be sustained as findings.

That portion of Finding III, which states that under German law the judgment was and it at all times remained the property of Mayfilm and could only be enforced by it; and that portion of Finding IV, which states that under German law the Decree did not bind appellee, had no effect upon the rights to or the ownership of the judgment, that it was not evidence herein; and Finding V, which states that under the German law Joe May never acquired ownership of the judgment and that the facts relied upon were insufficient to have the effect of transferring the judgment to him; and Finding VII, which states that under German law none of the transactions had between May, the Bank, and Mandl had the effect of transferring the judgment to Mandl, and that the facts relied upon were insufficient to vest title in Mandl are, and each of them is, *naked conclusions of law*. As findings, they cannot be sustained; as conclusions, they are

not supported by the remaining findings nor by the law, and the judgment based thereon cannot be upheld. Besides, Findings V and VII are so vague, uncertain and indefinite, and draw general conclusions from unknown and undefined facts, that they come within the condemnation of the rule stated in *Polheim v. Carpenter*, 42 Cal. 375, 386-7 (quoted in Op. Br. p. 70).

Appellee admits (Br. p. 37) that the statement in Finding IV that the Decree "was not evidence against defendants" is a *question of law*, but it says it is a *question of German law*, and therefore a proper finding. Such argument is untenable. The Decree, as evidence, is determined by the *law of the forum*, not German law; and while *proof* of foreign law is a *question of fact*, the *effect* of that law, when proved, is a *question of law*. (*Cummings v. O'Brien*, *supra*; *Jenness v. Simpson*, *supra*.) The findings are fatally defective.

VI.

Reply to Appellee's "Resume of Principles."

a. It is true that plaintiff must prove the fact of his assignment. This may be done by a judgment which determines title to property, *even against a non-party debtor*, where such judgment is an introductory fact to, the foundation of, or a "muniment" of plaintiff's title. (*Chapman v. Moore*, 151 Cal. 509, 516 (91 Pac. 324); and authorities cited in Op. Br. pp. 46-7.)

If the debtor asserts that title is still in the *unsuccessful* party to such judgment, the debtor, like the unsuccessful party, is conclusively bound by said judgment. (*Perkins v. Benguet*, *supra*; also Op. Br. p. 48.)

Where the debtor is protected from further litigation or liability, that is the full measure of his right to enforce proof of assignment, or question its validity. (*Bartlett Estate Co. v. Fraser, supra; Dorner v. Heffner*, 15 Cal. App. (2d) 97, 101 (58 Pac. (2d) 1308; see also Op. Br. pp. 67, 84.)

b. Appellee's statement is incomplete. The true rule is that a final judgment of a foreign country having jurisdiction to pronounce the judgment shall have the same effect as in the country where rendered, *and also the same effect as a final judgment rendered in California*. (Sec. 1915, C. C. P.; *Blain v. Burge*, 75 Cal. App. 418, 420.) Thus the law of Germany governed as to the effect of the Decree upon the rights, interests and conclusive adjudication between the parties and privies thereto. The law of California governed as to the *evidentiary effect* of said Decree. (*Sayles v. Peters, supra*; also Op. Br. p. 46.) In California it is conclusive *evidence* against the appellee. (*Perkins v. Benguet, supra*.)

c. Where an assignment is made in one place to be performed in another, the law of the place of performance will control in determining the validity of the assignment or whether an assignment exists. (See citations Op. Br. p. 83.)

The effect of an assignment is to be determined by the law of the forum, or the place where the rights claimed under the assignment are sought to be asserted. (6 C. J. S. 1138; *Block Bros. v. Liverpool & London etc. Co.*, 208 Ala. 523, 94 So. 563; *Jos. Dixon Crucible Co. v. Paul*, 167 Fed. 784, 786.

d. We admit that testimony regarding custom and usage is permissible in aid of interpretation of foreign law. That is all appellee's cases hold. Appellant's objections went to the *opinions* of appellee's witnesses (not upon custom or usage) which did *not interpret*, but *directly contradicted* the *written law*. This even appellee authorities do not *permit*.

e. Appellee practically *concedes* that the trial court erred in failing to give effect to the Decree. It seeks to support the Court's ruling by the Court's *own* opinion. No other authority is cited. This for obvious reasons. A comparison of the opinion with the cases of *Perkins v. Benguet, supra*; *Chapman v. Moore, supra*; and the authorities cited in the Opening Brief (pp. 46, 47, 48) quickly and conclusively demonstrate that said opinion is *clearly erroneous*.

VII.

Reply to Appellee's Criticism of Appellants' Brief.

Much ado is made by appellee that dots, used to indicate an omission, inadvertently are not included in *one* of appellants' many quotations. Originally, the quotation included them, but in the various drafts of the brief, the dots, some how became deleted, and their absence remained undetected. Most certainly it was not appellants' intention to mislead either court or counsel. We sincerely believe that we have not done so.

Appellee's criticisms of certain of appellants' authorities (Op. Br. p. 64) are without merit. In the *Dixon* case the precise point urged by defendant therein (being the

same as urged by appellee herein in respect to Mandl) was that plaintiff was not the owner of the chose in action upon which suit was brought, and that the assignment, under which he claimed, did not vest the title thereto, in plaintiff. The court held that whether the assignment vested title in plaintiff, as to authorize the suit and entitle him to judgment must be determined *by the law of the forum*. In the *Pritchard v. Norton* case, despite appellee's statement, the law *ultimately* applied therein, was the law of the place of *performance*, and not that of the place where the assignment was *made*.

Appellee, in its brief, like in the trial below, simply built up "straw men" so that it could knock them down. In reality, despite the apparent confusion, which appellee created below, and seeks to maintain in its brief, appellee's contentions and position, are unsound, and when analyzed in the *light* of the applicable authorities, clearly are untenable.

Conclusion.

In conclusion, we respectfully maintain that appellants have clearly established their chain of title to the judgment sued upon, and are entitled to recover thereon. We further respectfully contend that appellee utterly has failed to answer or refute, by satisfactory argument, or by applicable authority, the errors claimed, and the authorities cited by appellants. We therefore respectfully submit that upon the grounds and for the reasons stated, both herein and in the Opening Brief, that the judgment herein be reversed, with costs to appellants.

Respectfully submitted,

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SAMUEL W. BLUM,

Attorneys for Appellants.

APPENDIX.

Portion of Kammergericht Judgment [R. p. 120].

The 25th Civil Senate of the District Court of Appeal in Berlin, has, upon oral hearing of July 8, 1932, in the presence of the President of the Senate, Huecking, and the Counsellors of the District of Appeal, Kliene and Voss, have ordered adjudged and decreed: Upon appeals of both parties the judgment rendered on March 4, 1930, in the 17th Chamber of Commercial matters of the Superior Court I, Berlin, is changed as follows:

(1) The Defendant is ordered upon the complaint to pay 50,000.-R.M., plus 2% interest over and above Reichsbank discount rate from July 1, 1926.

Prayer of the Complaint for additional interest is denied.

(2) Upon the Cross-Complaint it is adjudged that the Plaintiff is not entitled to damages in excess of the 50,000 R.M., with interest awarded under 1) under the agreement of May 10, 1926.

(3) The costs of the lawsuit are canceled against each other.

(4) Temporary execution may issue under this judgment, the Defendant being permitted to prevent execution of judgment by putting up a bond in the amount of 55,000.00 R. M.

Grand Lodge, etc. v. Clark, 189 Ind. 373, 127 N. E. 280:

"It will be observed in this case that the appellant does not state whether or not the laws of Ohio upon which he relies were statutory. *He does not state what the laws are, but he states what in his opinion, is the effect of those laws. It is not sufficient in a pleading to state the effect of the laws of a sister state but such laws must be pleaded as facts are pleaded, and must state what the laws are and not what the effect of them may be.*" (Italics ours.)

McDougald v. Rutherford, 30 Ala. 253, at 257:

"The declaration after setting out the execution of the note, and its endorsement by the defendants' intestate at Columbus, Georgia, averred that 'by the laws of the State of Georgia where said endorsement was made, the said Daniel McDougald became liable to pay said sum of money in said note specified, to said plaintiff; and being so liable,' etc. A demurrer to the declaration was interposed, but overruled by the court.

". . . If then the declaration be good it must be made so by the pleading of the Georgia law. It is indispensable to the maintenance of the declaration that the averment of the Georgia law should show that the facts set forth impose a legal liability upon the defendant according to that law. *The declaration does not state what the law of Georgia is or was, but states a conclusion as to the effect of that law and as to the rights and liabilities of the parties under that law. . . .* The demurrer to the declaration ought to have been sustained and the court erred in overruling it." (Italics ours.)

Rochschild v. Rio Grande Western Railway Co., 13 N. Y. S. 361, 59 Hun. 594:

“The only allegation in the complaint from which this legal liability can be inferred is in these words: ‘Thereby, and under the laws of the State of Colorado and of the Territory of Utah aforesaid, all the debts, liabilities, and duties of said consolidating companies and corporations, respectively, thereupon attached to said new corporation, the defendant herein, and became enforceable against it to the same extent as if said debts, liabilities, and duties had been incurred or contracted by it.’ *The demurrer is upon the grounds that the laws of Colorado and Utah are facts which must be pleaded and that the bare allegations that under these laws the liabilities of consolidated companies became attached to defendant and enforceable against it, is insufficient to constitute a cause of action. We think the demurrer was well founded. The allegation is not a statement of fact, but of a legal conclusion from undisclosed facts.* It is in effect saying that under foreign laws of which we know nothing one person has become liable for another’s personal debts and it differs in no substantial particular from an allegation,—which has always been treated as a mere conclusion—that the defendant is indebted to the plaintiff. It is clear that the foreign law should have been pleaded. *The law of a foreign state is a fact to be alleged and proved like any other fact.* It is not necessary to plead the evidence of the fact, whether such evidence be embodied in the statutes of a foreign state or in the decision of its courts. *But the fact that a given proposition is the law must be stated, if such fact is essential to a recovery.* Judgment reversed.” (Italics ours.)

Kimmier v. Kimmier, 45 N. Y. 535:

"It is true that the complaint states that an answer not replied to is taken as true according to the laws of the State of Illinois and the practice of the court and 'in consequence thereof, the said court could not entertain jurisdiction of said case.' It is also alleged in general terms that the judgment was void in the State of Illinois. *These are statements of law, not of fact, and the sufficiency of the pleading is to be determined by facts stated not by conclusions of law averred.* In *Starbuck v. Murrey* (5 Wend. 159) Marcy, J. said: '*That part of the plea in this case which alleges that the defendant was not bound by the laws, or in any manner subject to the jurisdiction of Massachusetts is a statement of law, and not of fact . . . It is a question of law whether he was bound by the laws of Massachusetts or subject to the jurisdiction of its courts.*'" (Italics ours.)

Wilson v. Clark, 11 Ind. 385:

". . . and the complaint contained the following clause: 'By the law of Michigan in force at the date of the note and from thence hitherto the said Clark, or his endorsee, can alone maintain the action . . .'"

"The clause quoted from the complaint amounts to nothing. *It is a mere assumption by the pleader of a legal proposition without the averment of any facts for the proposition to rest upon. Pleadings should state facts, not legal propositions.*" (Italics ours.)

Stockman v. Simmons, 67 Ill. App. 83:

“The plaintiff in error pleaded that the note was executed and delivered in Indiana; that the plaintiff in error was only surety for Adell as the defendant in error knew at the time and that by the laws of the State of Indiana and by force of the statutes of Indiana in such cases made and provided; . . . the property of a surety upon a note or contract cannot be held liable for the debt until after the property of his principal shall have been exhausted by legal process . . . the plea does not state facts but inferences.” 1 Ch. Pl. 196 Ed. 1828: “What can or cannot be done by statutes of another state is a conclusion from the terms of the statute, and to claim any rights under such statute it must be set out . . . A demurrer was rightfully sustained to the plea.”

Pearce v. Rhawn, 13 Ill. App. 637, at 640:

“The first allusions to the laws of Pennsylvania is the mere conclusion of the pleader that the appointment of the appellee as trustee was in accordance with the statutes of that State, but the statutes themselves are not set out, nor is anything shown from which it can be determined whether that conclusion is in accordance with the facts or otherwise. The second allusion to the Pennsylvania law is also a mere conclusion of the pleader that, according to the laws of that State, that is by force and operation of those laws, the estate of John Landenberger became vested in said trustees. What those laws themselves are, is not shown, nor is anything averred from which we are able to determine whether they have, or can have the force and operation thus attributed to them. It follows that the demurrer to the interpleader should have been sustained and for error in overruling it the judgment will be reversed and the case remanded.”

Lomb v. Pioneer Sav. & L. Co., 96 Ala. 430, 434 (11 So. 154):

"Its language is, Complainant avers that, according to the laws of Minnesota, in force at the time of said contract and note, it was provided that any premium taken for loans made by the association such as complainant was, should not be considered or treated as interest, nor render such association amenable to the laws relating to usury. This, as a pleading of a foreign statute, is wholly insufficient under the authorities we have cited. It is insufficient for another reason. *It simply avers the effect of the law on 'premiums taken,' and contains no statement what the provisions of the law of Minnesota are as to premiums or interest promised to be paid.*" (Italics ours.)

Cubbedge, H. & Co. v. Napier, 62 Ala. 518:

"A general averment of the existence of the statute, and that it confers the right is not sufficient. It is a statement of the pleader rather than a statement of facts."

"If the usury consists in the violation of the law of a state other than that in which the enforcement of the contract is sought, the law is matter of fact, which must be pleaded with the certainty that any extrinsic fact must be pleaded which is essential to a right of action, or to constitute a defense. The pleader may be well satisfied of his construction of the foreign law, and may assert it as the law itself; that is not his province. The law must be substantially stated; and the facts must be averred which are supposed to constitute its violation. Then, the court can determine whether the facts—the foreign law, which is but a fact—and the transaction supposed to offend it, compel a repudiation of the contract."

Gibson v. Chicago G. W. Ry. Co., 225 Mo. 473, 125 S. W. 453:

“Plaintiff states that under and by virtue of Sections 3313 and 3443 of the Code of Iowa, actions for damages for the death of Martin M. Welch, survived to plaintiff, as administrator, and under and by virtue of said sections, plaintiff is authorized and empowered to sue and recover damages caused by the death of Martin M. Welch against defendant on account of the carelessness and negligence of defendant which resulted in the death of Martin M. Welch as hereinafter alleged:

“The allegations are in no sense statements of fact but are clearly conclusions of law drawn by the pleader. It is elementary that where a foreign statute or the statute of another state, is relied upon as giving, conferring or constituting a question of action, it must be substantially stated with such distinctness that the court may judge its effect. Not only must the law in such case be pleaded but the fact which constitutes its violation must also be pleaded.”

Phinney v. Phinney, 17 How. Pr. Rep. 197 (199):

“He died in April 1852, where not stated, leaving a widow and two sons and two daughters, who by his death it is said, under the laws of Spain and the provisions of the will of the deceased, without saying there were any such laws or will, or what were their contents became ‘seized and possessed’ of the whole estate, real and personal, and entitled to and interest in the same . . . This kind of statement involves a mere conclusion or inference in which the plaintiffs, it will be readily seen, may be greatly mistaken. They in effect express an opinion of the law and ask the court blindly to adopt it, without giving to the court the necessary materials to

test its correctness. Foreign law as well as private wills are mere facts, and like other facts must be set forth and proved. It is for the court and not for the parties to determine their legal effect when produced." (Italics ours.)

Temple v. Brittan, 11 Ky. L. Rep. 467, 12 S. W. 300:

"The allegation . . . is in substance that the infant intestate being domiciled in the State of Tennessee at the time of her death, her estate passed to her heirs at law under the statutes of descent and distribution of that state, and the appellants are the sole heirs at law of said intestate and as such they assert title."

"*Such an allegation is not, as has been frequently decided by this court, equivalent to a statement of fact, but admits to no more than a mere conclusion or interpretation of law . . . the conclusion of which the court has no means of determining in the absence of the statutes.*"

Templeton v. Sharp, 10 Ky. L. Rep. 499, 9 S. W. 507:

" . . . and that the legal rate of interest at that time in said state according to laws of said state was 10% per annum on all such obligations and that the contract to pay interest . . . as stipulated in said note was lawful in said state and enforceable under the laws thereof.

"This, so far as the law of California is concerned is *but a statement of a legal conclusion* . . . There is no reference to the particular statute of that state, if there be one upon the subject. There is no statement of it to enable this court to form an opinion as to its legal

effect. *To hold the plea good the opinion or conclusion of the pleader must be accepted as a fact.*"

"If the law of another state is relied upon by a party in the court of this state, *it must be regarded as a fact, which like any other fact must be so pleaded that the court may judge of its legal effect.*" (Italics ours.)

Jenness v. Simpson, 81 Vt. 109, 69 A. 646:

"And the defendant avers 'that on September 24, 1906, and for a long time previous thereto, ever since and now, it was and is the law of the State of South Dakota that a husband and his wife may legally contract with each other in the manner set forth in the contract'"

"*When the law of a sister state is properly set forth in the pleading as a fact, then a question of law arises therefrom as to the legal effect.* Here without setting forth the law the pleader makes an averment of his conclusions of *the legal effect, which is a conclusion of law* (citing authorities). It is a rule of pleading established beyond question that so much of the law of another state, or foreign country, as is material to the case, must be set forth by the party complaining or defending under it, that the court may judge of its legal effect." (Italics ours.)

Lowry v. Moore, 16 Wash. 476 (479), 48 Pac. 238:

" . . . the settled law is where a party relies upon the statutes of a sister state *he must plead it as he would any other fact, not by stating what in the opinion of the pleader is its legal effect but the statute itself should be set forth.*" (Italics ours.)

Bank of Commerce v. Fukua, 11 Mont. 285, 28 Pac. 291:

"The averment that the trusts are by the laws of the state in which the lands are situated, valid and subsisting trusts is therefore nothing more than an averment of the conclusion of the pleader, based (1) upon his knowledge of the existence of said statutes and (2) upon his construction of the same statutes. The following cases hold to the same effect: *Phinny v. Phinny*, 17 Howe Pr. 197; *Cary v. Railway Co.*, 5 Ia. 357, *De Vosse v. Gray*, 22 Ohio St. 159; *Swank v. Hufnagle*, 111 Ind. 453, 12 N. E. Rep. 303; *Trust Co. v. Burton*, 74 Wis. 329, 43 N. W. Rep. 141; *Sells v. Haggart*, 21 Neb. 357, 32 N. W. Rep. 66; *McLeod v. Railroad Co.*, 58 Vt. 727, 6 Atl. Rep. 648. In the case at bar the pleader alleged 'that by the statute of Kentucky \$2.50 only is allowed as a fee to an attorney in such case, and that a contract for a greater sum as attorney fees is by laws of State of Kentucky illegal and void.' This is an allegation of *the pleader's conclusion as to what the statute of Kentucky provides in that respect, but what that law is in terms is not set forth*. The court therefore properly granted the motion to eliminate from the answer that averment." (Italics ours.)

Swing v. Kargas Furniture Co., 150 Mo. App. 574, 131 S. W. 153:

"It is therefore essential, when asserting a right in the courts of this state said to have accrued or been derived from the laws of a foreign state that such laws should be pleaded in *hæc verba*, or substantially, at least to the end that the court may see and determine for itself what authority and what rights it purports to confer."

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOHN LUHRING and MARGARET MORRIS,
Appellants,

vs.

UNIVERSAL PICTURES COMPANY, INC., a
corporation,

Appellee.

PETITION FOR REHEARING.

FILED

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**IN THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT**

JOHN LUHRING and MARGARET MORRIS,

Appellants,

vs.

UNIVERSAL PICTURES COMPANY, INC.,

a corporation,

Appellee.

No. 10,014

Jan. 17, 1945

Appeal from the District Court of the United States for
the Southern District of California,
Central Division.

Before MATHEWS, STEPHENS and HEALY, Circuit Judges.

MATHEWS, Circuit Judge.

In a German court called the Landgericht, Mayfilm Aktiengesellschaft, a German corporation, hereafter called Mayfilm, brought an action against Universal Pictures Corporation, a New York corporation, seeking thereby to recover of the New York corporation 50,000 reichsmarks, claimed to be due and owing to Mayfilm, with interest from July 1, 1926. On March 4, 1930, the Landgericht rendered judgment to the effect that Mayfilm take nothing by its action. From that judgment Mayfilm appealed to a German court called the Kammergericht. In that court, on July 27, 1932, Mayfilm obtained judgment against the New York corporation for the amount claimed—50,000 reichsmarks, with interest from July 1, 1926. That judgment, hereafter called the Mayfilm judgment, was affirmed by a German court called the Reichsgericht on February 3, 1933.

Thereafter, prior to January 19, 1937, appellee, Universal Pictures Company, Inc., a Delaware corporation, acquired all property and assets of the New York corporation and assumed

all just and valid obligations of the New York corporation, and the New York corporation was dissolved.

On January 19, 1937, appellants, John Luhring and Margaret Morris, citizens of California, claiming to be the owners of the Mayfilm judgment, brought an action thereon against appellee¹ in the Superior Court of Los Angeles County, California, seeking thereby to recover of appellee \$35,256.99,² with interest from January 1, 1937. On appellee's petition, the action was removed from the Superior Court to the District Court of the United States for the Southern District of California. Appellee answered, jury trial was waived, the case was tried by the court, findings of fact and conclusions of law were stated, and judgment was entered in appellee's favor. From that judgment this appeal is prosecuted.

The question is whether appellants were the owners of the Mayfilm judgment.

The complaint alleged and the answer³ denied that the Mayfilm judgment was assigned to appellants by Union Bank & Trust Company of Los Angeles, a California corporation, hereafter called Union Bank. No other title to the Mayfilm judgment was asserted by appellants. The evidence showed that on January 16, 1937, Union Bank executed what purported to be an assignment of the Mayfilm judgment to appellants,⁴ but there was no evidence that Union Bank ever owned the Mayfilm judgment.

The complaint alleged and the answer denied that the Mayfilm judgment was assigned to Union Bank by Fritz Mandl. There was no evidence of any such assignment. The evidence showed that on April 22, 1936, Mandl executed what purported

¹The New York corporation, also named as a defendant, was dissolved before this action was brought. Appellee, therefore, is here treated as the sole defendant.

²Claimed to be the value, on January 1, 1937, of the principal sum (50,000 reichsmarks), plus accrued interest (35,142.48 reichsmarks), awarded to Mayfilm by the Mayfilm judgment.

³The complaint and answer referred to in this opinion are appellants' amended complaint and appellee's amended answer thereto.

⁴This purported assignment was received in evidence as appellants' Exhibit 8.

to be an assignment to Union Bank,⁵ but that was not, and did not purport to be, an assignment of the Mayfilm judgment. It purported to be an assignment of a claim.⁶ There was no evidence that Mandl ever owned the Mayfilm judgment.

The complaint alleged and the answer denied that the Mayfilm judgment was assigned to Mandl by Bank fur Auswartigen Handel Aktiengesellschaft, a German corporation, hereafter called the German bank. There was no evidence of any such assignment. Mandl testified that a claim of the German bank against the New York corporation was assigned to him by the German bank,⁷ but he did not testify that the Mayfilm judgment was assigned to him by the German bank or anyone else. There was no evidence that the German bank ever owned the Mayfilm judgment.

The complaint alleged and the answer denied that the Mayfilm judgment was assigned to the German bank by Joe May. There was no evidence of any such assignment. The evidence showed that on February 12, 1936, the German bank wrote a letter to the New York corporation,⁸ stating that May had given the German bank an assignment of the Mayfilm judgment, but there was no evidence that the statement was true. A purported copy of the purported assignment was set out in the letter, but the original—if an original existed—was not put in evidence. There was no evidence that it ever existed, nor was there any evidence that May ever owned the Mayfilm judgment.

The complaint alleged and the answer denied that on February 25, 1935, in an action by the German bank against Mayfilm, the Landgericht rendered a judgment “providing” that the

⁵A translation of this purported assignment was received in evidence as appellants' Exhibit 6.

⁶It mentioned two claims—a claim of Mayfilm against the New York corporation and a claim of Bank fur Auswartigen Handel Aktiengesellschaft against Mayfilm—and stated: “With these premises, I, the undersigned Fritz Mandl, hereby assign this claim to [Union Bank].” Which of the two claims was “this claim” we do not know.

⁷This assignment was not put in evidence. Mandl testified that it was a written assignment executed “between 1932 and 1934,” but that he did not know where it was.

⁸A translation of this letter was received in evidence as appellants' Exhibit 5.

alleged assignment of the Mayfilm judgment by May to the German bank was legally valid. There was no evidence that the Landgericht rendered any such judgment. The evidence showed that on May 30, 1934, the German bank brought an action against Mayfilm in the Landgericht, alleging that the claim asserted by Mayfilm in its action against the New York corporation—the claim on which the Mayfilm judgment was based—was the property of May and not of Mayfilm, and that May had assigned the claim to the German bank.⁹ On February 25, 1935, in the German bank's action against Mayfilm, the Landgericht rendered a declaratory judgment to the effect that the claim was the property of May and not of Mayfilm, and that the alleged assignment of the claim by May to the German bank was legally valid. The declaratory judgment did not declare that the Mayfilm judgment was the property of May, or that May had assigned the Mayfilm judgment to the German bank—validly or otherwise. No assignment of the Mayfilm judgment was mentioned or referred to in the declaratory judgment.

There was no evidence that the Mayfilm judgment was ever assigned or transferred by Mayfilm, or that title to the Mayfilm judgment ever passed from Mayfilm. The District Court accordingly found that the Mayfilm judgment was at all times the property of Mayfilm, and that neither May nor the German bank nor Mandl nor Union Bank nor appellants ever acquired or owned the Mayfilm judgment. These findings are amply supported by evidence.

The District Court concluded, and we agree, that appellants were not entitled to recover in this action.

Affirmed.

(Endorsed:) Opinion. Filed Jan. 17, 1945. Paul P. O'Brien, Clerk.

⁹A translation of the pleadings and judgment in the German bank's action against Mayfilm was received in evidence as appellants' Exhibit 4. Neither the New York corporation nor appellee was a party to that action.

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No. 10,014

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOHN LUHRING and MARGARET MORRIS,

Appellants,

vs.

UNIVERSAL PICTURES COMPANY, INC., a
corporation,

Appellee.

PETITION FOR REHEARING.

*To the Honorable United States Circuit Court of Appeals
for the Ninth Circuit and to the Honorable Judges
Thereof:*

Comes now the appellants in the above entitled cause and presents this their petition for rehearing, and in support thereof respectfully show :

Statement of Grounds for Rehearing.

That the Opinion of this Honorable Court, in affirming the judgment of the District Court in the above entitled case :

(1) Is directly contrary to, and erroneously applies the German law regarding assignment of judgments, by hold-

ing that an assignment of the *claim*, confirmed in and made enforceable by a judgment, does not carry with it an assignment of and title to the judgment itself.

(2) Misconstrues and overlooks the undisputed evidence that under German law a judgment as such is *not* assigned; that only the *claim* is assigned, and that *title* to the *judgment* follows the *title* to the claim.

(3) Conflicts with, and is contrary to the established American law that the claim merged in and evidenced by a judgment, and the judgment itself, are inseparable, and that an assignment of such claim carries with it an assignment of the judgment itself.

(4) Ignores the fact that appellee did not challenge, but actually conceded the sufficiency of the assignment from Mandl to the Union Bank to effectuate a transfer of the May Film judgment to Union Bank, if Mandl owned said judgment.

(5) Misconstrues the effect of the German Declaratory Judgment, by erroneously holding that said decree declared that the *claim* upon which the May Film Judgment is based was the property of May, and not of May Film Corporation and that May's assignment thereof to the German Bank was valid, but did not declare that the May Film *judgment* was the property of May and that his assignment thereof to the bank was valid. In so erroneously holding, this Court overlooked, and failed to consider, the undisputed evidence that under German law the ownership of and title to a judgment follows the ownership of and title to the claim, and that it is the claim, not the judgment, which is assigned.

(6) Erroneously holds that there is no evidence (a) that Union Bank, or (b) that Mandl, or (c) that German

Bank, or (d) that May, ever owned the May Film judgment. This is based upon an erroneous holding that the assignment of the claim against Universal was not an assignment of the May Film judgment itself. Such holding is contrary to the German law which holds that it is the claim, not the judgment which is assigned, and that title to the judgment follows title to the claim; it is also contrary to the American law which holds that the claim and the judgment itself are inseparable, and that an assignment of the claim carries with it an assignment of and title to the judgment itself.

(7) Erroneously holds that there is no evidence that the May Film judgment was ever assigned or transferred by May Film Corporation, or that title to the May Film judgment ever passed from May Film Corporation. This is based upon an erroneous interpretation of the legal effect of the German Declaratory Decree, and by overlooking or misconstruing the German law which holds that the title to the judgment *follows* title to the claim; and that it is the claim, not the judgment, which is assigned.

(8) Erroneously holds that the findings which state that the May Film judgment was at all times the property of May Film Corporation, and that neither May nor the German Bank, nor Mandl, nor Union Bank, nor appellants, ever acquired or owned the May Film judgment are supported by the evidence, when in fact the evidence is contrary thereto.

(9) Ignores the fact that appellee has never challenged, but has conceded, the principle that the assignment of the claim upon which the May Film judgment was based also constituted an assignment of the May Film judgment. Appellee contended that the "claim" was never assigned,

and therefore as a consequence the May Film judgment was never assigned.

(10) Disregards the well settled principle that the intention of the parties to an assignment prevails, and that an assignment must be upheld if possible.

(11) Disregards entirely the principle that where neither assignor nor assignee questions, but admits, the sufficiency of an assignment that the debtor then cannot question its sufficiency.

(12) Fails to consider all of the evidence regarding the assignment from Bank to Mandl, and fails to determine whether there was an equitable and therefore an actual assignment of the judgment from Bank to Mandl.

(13) Disregards appellants' contention that the material findings are but conclusions of law, and are insufficient to constitute findings of fact, either in form or substance.

(14) Disregards appellants' contention that the trial court erred in admitting evidence attempting to show the German Declaratory Decree was erroneous.

(15) Disregards appellants' contention that the judgment herein is based upon findings which in material matters are not sustained by the evidence but actually is contrary thereto.

(16) Disregards appellants' contention that the judgment herein and the conclusions of law are contrary to the law.

(17) Misconstrues and overlooks the factual situation upon which appellants' cause of action is based.

(18) Affirms a judgment which plainly is erroneous and unsupported by and contrary to the evidence; and that the opinion itself turns upon an issue which is not, and

was not in the case, but is one created solely by this Court, to-wit: whether the assignment of the claim against Universal constituted an assignment of the May Film judgment itself, and this Court's determination of that issue is directly in conflict with and contrary to both the German and American law on that subject.

Statement of Facts.

The opinion fails to fully state the factual situation involved herein. A brief résumé is therefore necessary for a complete understanding of the points urged.

In 1926 May Film Corporation, a German corporation, brought action against Universal Pictures Corporation, a New York corporation, for breach of contract in the Landgericht (Superior Court), a German court, for recovery of 50,000 German Reich marks and interest. On May 4, 1930, judgment was rendered for defendant. [R. pp. 106-114.]

On July 27, 1932, upon appeal, the Kammergericht (District Court of Appeal), a German court, reversed the Landgericht judgment, and awarded May Film a judgment against Universal for 50,000 German Reich marks with interest from July 1, 1926. [R. pp. 117-170.] On February 3, 1933, the Reichsgericht (Supreme Court), a German court, affirmed said judgment. [R. pp. 171-197.]

On May 30, 1934, the Bank of Foreign Commerce, a German bank, asserting ownership to the May Film judgment, commenced an action for declaratory relief against the May Film Corporation in the Landgericht to have it declared that the claim asserted in the *May Film v. Universal* case was the property of May, and not the May Film Corporation, and that May's assignment thereof to

the Bank was valid. [R. p. 206.] The liquidator of May Film Corporation was then disputing the Bank's ownership of May Film claim and judgment.

On February 11, 1935, the Landgericht rendered judgment declaring that the May Film claim—50,000 Reich marks, with interest from July 1, 1926—was the property of May, and not of May Film Corporation, and that May's assignment thereof to the Bank was valid. [R. pp. 226-7.] Said action disclosed that on May 30, 1932, May had assigned the May Film claim to the Bank. [R. pp. 210-212.]

During the trial of the instant case May testified that on May 9, 1932, he further executed the original of an assignment of the May Film *claim and judgment* to the Bank, a copy of which appears in Plaintiff's Exhibit 5. [R. p. 482.]

The assignment by May to the Bank of the May Film claim and judgment was "by way of security" for an obligation due the Bank. This obligation had been guaranteed by May and Fritz Mandl. [R. pp. 264, 280.]

Subsequently Mandl, as guarantor, paid this obligation and became entitled to the security, *i. e.*, the May Film claim and judgment. Mandl's right to receive this security was not questioned by appellee. [R. pp. 263, 280.] Appellants introduced evidence, oral and documentary, of a written assignment of the May Film claim by the Bank to Mandl [R. pp. 264, 270, 295-7, 246-7] as well as facts disclosing an assignment by operation of law.

Under date of February 12, 1936, said Bank in writing notified Universal in New York that the claim against Universal in the amount of 50,000 Reich marks together with interest from July 1, 1926, "had been transferred to Mandl," and that Universal "can satisfy this debt only by payment to" Mandl. [R. pp. 295-7.]

On April 29, 1936, Mandl in writing assigned the claim against Universal to the Union Bank. [R. pp. 254-6.]

On January 16, 1937, Union Bank assigned the May Film judgment to appellants. [R. pp. 258-9.]

Appellee did not challenge or question these last two assignments. [R. pp. 30, 253, 258; see Appellee's Br. p. 2, note 2.]

At the trial the May Film judgment was computed in American dollars as \$11,862.50 principal, \$12,472.26 interest to September 24, 1940. [R. pp. 301-5, 120, 303, 549.]

Appellee conceded that the New York corporation, the original judgment debtor, had been dissolved and that appellee had assumed and agreed to pay the former's obligations, subject to all defenses and set-offs. [R. p. 20.]

At the trial below, the appellee's own witness testified, and the undisputed evidence shows, that UNDER GERMAN LAW, A JUDGMENT AS SUCH CANNOT BE TRANSFERRED; THAT ONLY THE CLAIM CAN BE TRANSFERRED AND THAT THE TITLE TO THE JUDGMENT FOLLOWS THE TITLE TO THE CLAIM. [R. pp. 328, 391-2.]

The Court herein obviously has *overlooked* the foregoing vital evidence in rendering its decision herein.

Outline of Appellants' Chain of Title.

The vital question herein is whether appellants established their ownership to the May Film judgment. The following graphically illustrates that the answer thereto must be "yes."

To better understand this outline this Court must bear in mind:

(a) That under German law a judgment as such cannot be assigned; that *only the claim* can be assigned, and that title to the judgment follows the title to the claim.

(b) That under American law the claim or debt evidenced by or in the judgment, and the judgment itself are *inseparable*, and that an assignment of the claim, whether before or after judgment, carried with it an assignment of and title to the judgment itself.

These principles are fundamental and presently will be more fully developed and discussed.

I. Appellants established their ownership to the May Film judgment.

(1) The German Declaratory Decree conclusively adjudicated, declared and established "that the claim asserted in the case of May Film Corporation vs. Universal . . . in the amount of 50,000 R. M. with interest is the property of Joe May personally, and not of May Film Corporation . . . and therefore the assignment made by May to plaintiff (German Bank) is legally valid." [R. pp. 226-7.]

(a) This, under German law—that ownership of the judgment follows the ownership of the claim—constitutes an adjudication that the May Film judgment was the property of Joe May, and not of May Film Corporation, and that the assignment thereof to the Bank was valid.

(2) The German Declaratory Decree itself is effective as and itself constitutes an assignment or transfer of the claim against Universal (and therefore under German law of May Film judgment itself) from May Film Corporation to Joe May, and from him to the German Bank; it established the *ownership* of May Film judgment *in the German Bank* and *divested* May Film Corporation of any and all ownership in and to the May Film judgment.

(a) The judgment roll therein further discloses that May Film Corporation assigned the claim against Universal to Joe May, who in turn assigned it to the Bank. Said assignment under German law carried with it the title to the May Film judgment.

(b) May testified that he executed an assignment of the claim and the May Film judgment to Bank, a copy of which appears in Plaintiff's Exhibit 5. [R. p. 482.]

(3) There was an effective transfer of the claim against Universal (and therefore of the May Film judgment) from Bank to Mandl.

(a) By actual assignment—Mandl's undisputed testimony of the assignment by Bank of the claim (and therefore of the May Film judgment) to him.

(b) By the "notice" from the Bank to Universal constituting an equitable, and therefore an actual, assignment under the law of the forum; and under American law providing that an assignment of a claim carries with it an assignment of and title to the judgment itself.

(c) By operation of law.

(4) There was an effective transfer of the claim against Universal (and therefore of May Film judgment) by Mandl to the Union Bank.

(a) By actual written assignment—the assignment of the claim against Universal under either German or American law carried with it the ownership of and title to May Film judgment itself.

(b) This assignment was not challenged by appellee, either below or in this Court, and was conceded to be sufficient to transfer whatever interest Mandl owned in the May Film judgment to the Union Bank. [See Appellee's Br. p. 2, note 2, and R. p. 253.]

(5) The written assignment of the May Film judgment by Union Bank to appellants, being unchallenged by appellee, or by this Court, completes appellants' chain of title to and ownership of the May Film judgment in appellants.

II. The Declaratory Decree was effective to vest title of the claim against Universal (and therefore of the May Film judgment) in Joe May as against Universal. It constituted a "muniment of title" in appellants' chain of title, and under appellee's contention said decree is conclusive against it even though Universal was not a party to that suit.

(1) Appellee stands in the shoes of May Film Corporation when it asserts that May Film Corporation, notwithstanding the Declaratory Decree, still owns the May Film judgment, and, like May Film Corporation, it is conclusively bound by the said Decree.

(2) The Decree is evidence against appellee as a conclusive "muniment of title" under the laws of the forum which governs on matters of evidence.

ARGUMENT—POINTS—AUTHORITIES.

I.

The Decision Herein Is Based Upon the Erroneous Premise That the Assignment of the Claim Against Universal Did Not Transfer The Title to the May Judgment Itself. This Is Contrary to the Established German and American Law Relating to Assignment of Judgments.

This Court in affirming the judgment herein has placed its decision upon the hypertechnical, though erroneous, ground that the various assignments of the claim against Universal, while they transferred the *claim*, were insufficient to and did not transfer the title to or the ownership of the May Film *judgment* itself. This is the basis of the Court's decision herein. No such issue was involved in this case. No such contention was urged by appellee. It was conceded, and the undisputed evidence shows, that if the *claim* against Universal was assigned, that such assignment carried with it the title to the May Film *judgment* itself. Yet this Court, without citation of any authority, has sustained the judgment upon a theory which can find no support in either the evidence or under settled principles of German or American law. This basic error has been caused by the following:

- (1) The Decision Herein Overlooks the Undisputed German Law Which Holds That a Judgment as Such Cannot Be Assigned; That Only the Claim Can Be Assigned and That Title to the Judgment Follows Title to the Claim.

It is apparent that this Court has failed to consider the following important evidence herein. *Appellee's* own witness, Dr. Golm, testified on direct examination as follows:

"Q. By Mr. Selvin: Upon the facts which we assumed in my first question, Doctor Golm, do you have an opinion as to whether or not the part, that we referred to in the hypothetical question as Joe May, acquired, by reason of this circumstances, any interest in or title to the judgment of the Kammergericht as distinguished from the claim upon (144) which the judgment is founded? A. IN GERMAN LAW YOU CANNOT TRANSFER A JUDGMENT, AS SUCH; THAT MEANS THE DOCUMENT. YOU CAN TRANSFER ONLY THE CLAIM, AND THE TITLE TO THE JUDGMENT FOLLOWS THE TITLE TO THE CLAIM.

Q. So that if no title to the claim was acquired none was acquired to the judgment? A. That is impossible." [R. pp. 327-8.]

And in answer to a further question, the same witness further testified:

"A. SUPPOSING IN THE CASE THE PARTY HAS A JUDGMENT, WHICH MEANS REALLY THAT THE PARTY HAS A CLAIM AGAINST A CERTAIN DEBTOR WHICH HAS BEEN CONFIRMED AND MADE ENFORCEABLE BY A JUDGMENT."¹ [R. pp. 328-9.]

¹The witness then explaining a method by which the *writ of execution* could be transferred to a new creditor.

On cross-examination this same witness testified as follows concerning both the pledging and assignment of a judgment under German law:

“Q. How is a judgment pledged? A. A judgment, as such, can never be pledged, because a (243) judgment is a document which is the proof in which is vested a claim. The claim resulting from this judgment or confirmed by this judgment can be pledged.

Q. You said yesterday that if a claim is assigned the judgment follows the claim? A. If a claim is assigned—are you speaking about the pledge now, or about the assignment? It is quite different.

Q. I asked you how can we pledge a judgment. You said you cannot pledge a judgment. A. You can pledge the claim.

Q. You can pledge the claim? A. Yes.

Q. When you pledge a claim on which there is a judgment how is this done? A. This has to be done in this way: That I give a declaration stating, ‘I herewith pledge the claim, which is dealt with and which is fixed in this judgment, to you, as my creditor.’ And since the judgment itself—I mean the piece of paper is a tangible thing it would be far more necessary that I deliver this corporeal thing to the creditor.

Q. What is the corporeal thing that you would deliver? A. The piece of paper.

Q. What piece of paper? A. The judgment rendered by the Court. But this is not a necessary—that is not the principal thing which is necessary in order to pledge a claim. AS I SAID YESTERDAY, (244) THE JUDGMENT FOLLOWS THE CLAIM.

Q. Yes. A. IF THE CLAIM IS ASSIGNED TO FULL EXTENT AND TO FULL RIGHT THEN THERE IS NO DOUBT THAT THE CREDITOR HAS THE RIGHT TO CLAIM THE JUDGMENT, ALSO, and there is no doubt, either, that in this case the creditor is entitled to a further step, which I wanted to point out yesterday." [R. pp. 392-3.]

The foregoing evidence conclusively shows that under German law the various assignments of the claim against Universal (May Film to May to Bank to Mandl) as well as the adjudication of *ownership* of the claim by the Declaratory Decree, carries with them, and each of them, not only the title to and ownership of the claim, *but also the title to and ownership of the May Film judgment itself*. This Court's decision to the contrary is unquestionably error.

- (2) The Decision Is Also Contrary to the Well Settled Principles of American Law That the Claim and the Judgment Are Inseparable, and That an Assignment of a Claim, Whether Before or After Judgment, Carries With It the Title to and Ownership of the Judgment Itself.

If the sufficiency of the various assignments, or some of them, are to be tested by the application of the American law, the decision herein, nevertheless, is basically erroneous. The severance by this Court of the ownership of the *claim* against Universal from the ownership of the May Film *judgment* itself is completely incompatible with the settled American doctrine that the ownership of the claim and the ownership of the judgment are *inseparable*, and that the ownership of both the claim and the judgment passes with an *assignment of either* the claim or the judgment.

This rule is best stated in the leading case of *Rufe v. Commercial Bank*, 99 Fed. 650 (4th Cir.).

It appears in this case that *after* rendition of judgment in another action, judgment creditor gave a power of attorney to his lawyer to collect from judgment debtor the moneys recovered by the judgment. The power of attorney operated as an assignment of the *moneys* so recovered. No assignment of the judgment itself was given. Subsequently the judgment was vacated and another judgment was rendered. A dispute arose over the ownership of the second judgment, the bank asserting its ownership through the aforementioned assignment, while Rufe asserted that the power of attorney assigned only the *claim*, but not the *judgment* itself, and therefore the bank's contention was defective. The Circuit Court upheld the assignment in the following language (p. 653):

"It is contended that the irrevocable power of attorney did not give Mr. Blackford any interest in the judgment, but only in the proceeds of the judgment. *The judgment is nothing but the adjudication of the court in respect to the cause of action.* McNulty v. Hurd, 72 N. Y. 521. It furnished the means of enforcing the collection of the debt. *'It is impossible to separate them. The judgment would be barren, nor can we conceive of its existence without the debt.'* Pattison v. Hull, 9 Cow. 747. *The debt is the principal thing. By whatever terms the assignment was made, if the debt passed all rights and remedies for its collection also passed with it. The right to the debt, as evidenced by the judgment against the defendants, cannot exist in the hands of different persons. One cannot hold the judgment, and another the debt. They are inseparable.* Bolen v. Crosby, 49 N. Y. 183. *So when the instrument*

passed the whole sum evidenced in the judgment, and devoted it, in the hands of Mr. Blackford, to certain specific uses, with that passed also 'all the rights and remedies for its recovery and collection;' that is to say, the judgment and its incidents." (Italics ours.)

In *Ashburn v. McDonald*, 91 Mont. 83 (5 Pac. (2d) 586), it was also contended that the assignment of the claim did not carry with it the title to the ensuing judgment. In rejecting such a contention, the Supreme Court of Montana stated:

"But plaintiff contends that the assignment of the claim did not carry with it the judgment thereafter procured on the claim. This contention cannot be sustained. *The assignment of a debt carries with it all rights that are incidental to it* (3 Cal. Jur. 279). *The judgment is a step taken for the purpose of enforcing the claim by merging the claim into the form of a judgment. The assignment of the claim operated as assignment of the means of enforcing it and carried with it the judgment."* (Italics ours.)

In *Batesville Institute v. Kauffman*, 18 Wall. 154 (21 L. Ed. 775), the Supreme Court stated the following:

"Again, no principle is better settled than this, that the assignment of a debt carries with it an assignment of a judgment or mortgage by which it is secured."

In *North v. Evans*, 1 Cal. App. (2d) 64 (36 Pac. (2d) 133), the California Court also held that *one* person cannot hold the judgment and *another* person hold the debt, as they are *inseparable*.

In *Brown v. Scott*, 25 Cal. 189, the California Supreme Court held that an assignment of the judgment effected an

assignment of the debt for which it was obtained, even though the judgment itself was void as being beyond the jurisdiction of the court to make.

In 3 Cal. Jur., page 279, we find the following rule:

“32. Incidental rights. The assignment of a debt ordinarily carries with it all rights that are incidental to it, and entitled the assignee to all remedies, liens or securities that could have been used, or made available by the assignor as a means of indemnity or payment.”

One of those rights incidental to an assignment of a claim, which becomes, or has been merged in a judgment, *is the judgment itself*. Thus the ownership of the judgment passes with the assignment of the debt or claim. (*Rufe v. Commercial Bank, supra; Ashburn v. McDonald, supra.*)

Other authorities which hold that the debt and the judgment thereon are inseparable, and that an assignment of one carries with it the assignment of the other, that is, the assignment of the claim carries with it the assignment of the judgment, or the assignment of the judgment carries with it the assignment of the claim, are: *Pattison v. Hull*, 9 Cow. 747; *Bolan v. Crosby*, 49 N. Y. 183; *Wright v. Parks*, 10 Iowa 349; 2 *Black on Judgments* 1405; 2 *Freeman on Judgments* 2206; 5 *C. J.* 951, Par. 129.

We therefore respectfully submit that under *both the German and American law* the various assignments by which the “claim against Universal” was assigned, whether before or after the rendition of the May Film judgment, *as a matter of law carried with them the title to the May Film judgment itself*. Accordingly, the decision herein to the contrary, is basically erroneous, and a rehearing should be granted herein so that such error may be corrected.

II.

The Decision Erroneously Limits the Scope and Effect of the German Declaratory Judgment to a Declaration of the Ownership and Assignment of the Claim, as Distinguished From the Ownership of the May Film Judgment Itself. There Is No Such Distinction Under German Law Which Provides That the Title to the Judgment Follows the Title to the Claim.

The Court in its opinion states:

“On February 25, 1935, in the German Bank’s action against Mayfilm, the Landgericht rendered a declaratory judgment to the effect that the *claim* was the property of May and not of Mayfilm, and that the alleged assignment of the claim by May to the German bank was legally valid. *The declaratory judgment did not declare that the Mayfilm judgment was the property of May, or that May had assigned the Mayfilm judgment to the German bank—validly or otherwise. No assignment of the Mayfilm judgment was mentioned or referred to in the declaratory Judgment.*” (Italics ours.)

The italicized portion of the foregoing statement we submit is clearly erroneous. It overlooks a *fundamental* principle of German law.

- (1) The Declaratory Judgment in Effect Did Declare That the May Film Judgment Was the Property of May and That His Assignment of Said Judgment to the Bank Was Valid.

The declaration in the Declaratory Decree, as to the ownership and assignment of the *claim*, likewise constituted a declaration as to the ownership and assignment of the May Film *judgment* itself, for under the German law the title to the May Film judgment followed the title to the claim upon which it was based. Furthermore, the German law also provided that the May Film *judgment* as such could *not* be assigned, but that *only the claim could be assigned and that such assignment carried with it the title to the May Film judgment itself.*

Obviously this Court in speaking of the Declaratory judgment has overlooked the testimony previously quoted under the preceding point in this Petition to the effect that under German law the judgment “means the document”; that a person “cannot transfer a judgment as such” but “can transfer only the claim, and the title to the judgment follows the title to the claim”; that “in the case the party has a judgment” this “means really that the party has a *claim* against a debtor which has been confirmed and made enforceable by a judgment” [R. pp. 328-9]; that “the judgment follows the claim” and “if the claim is assigned to full extent and to full right, then there is no doubt that the creditor has the right to claim the judgment also.” [R. pp. 392-3.]

This evidence clearly demonstrates that the Declaratory judgment did “declare that the Mayfilm judgment was the

property of May" and "that May had assigned the May-film judgment to the German Bank—validly." It also completely explained why "no assignment of the Mayfilm judgment was mentioned or referred to in the declaratory judgment," namely, because under German law *the judgment as such could not be assigned; that only the claim could be assigned*. The Declaratory judgment, therefore, properly referred only to the assignment of the claim *without reference to any assignment of the May Film judgment itself*. This was correct under the German law. Nevertheless, the title to the May Film judgment, under that law, followed the title to the claim without reference to an assignment of the judgment itself.

Furthermore it was definitely stated and understood that the Declaratory judgment included, not only a declaration as to the claim, but also a declaration as to the ownership of the May Film judgment itself. This is disclosed by the following proceedings had when Dr. Pinner was testifying:

"The Court: The court gave judgment which stated that May Film Corporation did not own, but that Joe May owned the judgment; is that correct?
A. Yes, I got the judgment according to my complaint, favorable to May (368).

The Court: All right.

Q. By Mr. Hirschfeld: And, also, that the assignment was made to the Bank for Foreign Commerce? A. Yes; that is included in the judgment."²
[R. p. 489.]

²The questions and answers are referring to the German declaratory judgment.

It was never appellee's position that an assignment of or ownership of the claim did not carry with it the ownership of the May Film judgment. This was properly conceded. Appellee contested the ownership of the *claim*; not the ownership of the claim, as distinguished from the ownership of the May Film judgment itself. It contended that notwithstanding the adjudication in the Declaratory judgment that May, and not May Film, was the owner of the claim; that said adjudication was *incorrect*, and that May, in fact, was *not* the owner of the *claim*, and thus acquired no ownership in the May Film judgment itself.

Such contention was and is erroneous.

The effect of the decree as *evidence* in this action will be discussed in the succeeding pages of this Petition.

It follows from what we have said herein that this Honorable Court's interpretation of the Declaratory judgment in limiting it to an adjudication of the claim, as distinguished from the ownership of the May Film judgment, is clearly erroneous.

A rehearing is necessary to correct such error.

III.

The Evidence Is Sufficient to Establish Appellants' Ownership to the May Film Judgment. The Decision Herein, to the Contrary, Overlooks and Misconstrues Important Evidence, and the Legal Principles Applicable Thereto.

The Court in its opinion states:

"There was no evidence that the Mayfilm judgment was ever assigned or transferred by Mayfilm, or that title to the Mayfilm judgment ever passed from Mayfilm. The District Court accordingly found that the Mayfilm judgment was at all times the property of Mayfilm, and that neither May nor the German bank nor Mandl nor Union Bank nor appellants ever acquired or owned the Mayfilm judgment. *These findings are amply supported by evidence.*"

This conclusion, we submit, is incorrect. The Court in evaluating the evidence overlooked the evidence which disclosed that under German law it is the claim, not the judgment, which can be assigned, and that title to the judgment follows the title to the claim. It also was under the misapprehension, as to both German and American law, by making a distinction between an assignment of a claim, and the assignment of the judgment itself, when in fact no such distinction exists.

As a result, this Honorable Court erroneously concluded that the various assignments of "claims against Universal," without an actual assignment of the May Film judgment itself, were insufficient to transfer the May Film judgment. It further erroneously concluded that the Declaratory judgment was a declaration relating solely to the ownership and assignment of the claim, and therefore it

was held insufficient to include the May Film judgment itself. In these conclusions this Honorable Court was basically wrong.

We therefore submit that a re-examination of the evidence, correctly interpreted, will clearly establish appellants' ownership to the May Film judgment itself. This ownership will be traced from its source down to the appellants.

(A) THE DECLARATORY JUDGMENT.

This Declaratory judgment is the foundation of, and the introductory fact to, a link in appellants' chain of title. It is from this decree that appellants stem their ownership of the May Film judgment. It is therefore of prime importance to determine not only the scope of its adjudication, but also its admissibility, value and weight as evidence in this case as against appellee.

- (1) **The Declaratory Judgment Declared and Conclusively Established, Between the Parties Thereto, i. e., the German Bank and May Film Corp., That the May Film Judgment Was the Property of May, and Not of May Film, and Therefore May's Assignment of Said Judgment to the German Bank Was Valid.**

While the decree by its terms refers to the "claim asserted in the case of May Film Corporation vs. Universal" this, under German law, included the May Film judgment and constituted an adjudication and declaration as to the ownership of the May Film judgment itself.

It was conceded that under German law the title to the judgment followed the title to the claim, and that the judgment as such could not be assigned; that only the claim could be assigned. (Point I of this Petition.)

Likewise it was conceded that the Declaratory judgment, between the parties thereto, established and adjudicated that the May Film judgment was the property of May, and not of May Film; that May's assignment thereof to the Bank was valid, and that said decree was binding upon and conclusive and *res adjudicata* between the parties to that judgment. [R. pp. 338-340, 342, 369, 489.]

- (2) The Effect of the Declaratory Judgment Was to Transfer Title of the May Film Judgment From May Film Corporation to the German Bank. It Divested May Film Corporation of All Title to the May Film Judgment and Established the Title Thereto in the German Bank.

This rule is succinctly stated in Restatement of the Law—Judgments—page 524:

“110. JUDGMENT AS A TRANSFER OF TITLE.

“In an action involving any property interest, where a court which has jurisdiction over the property interest renders a judgment which determines that one of the parties has a right or title superior to that of the other party, the judgment has the effect of an involuntary transfer from the unsuccessful party to the other.”

“ . . . The rule may operate to create or to destroy a title or claim the validity of which is dependent upon whether there was or was not a transfer from one of the parties to the action to the other. . . . ”

In the leading case of *Chapman v. Moore*, 151 Cal. 509 (51 Pac. 324), the California Supreme Court in referring to the effect of a decree in another action as a

transfer of title between the parties thereto, as against a stranger to that action, stated (p. 516):

“It was conceded on the trial that in 1887 the legal title to the lot in controversy was in Walter Patterson. . . . It was defeated and barred by the judgment obtained by Davis, the predecessor of plaintiff, against Patterson in 1894. As between these two it was there adjudged that the legal title, conceded . . . in Patterson, was, as against him, in Davis, *and such adjudication was as effective evidence of title to the property in the latter . . . as if Patterson had made him a conveyance of it by deed. . . .*”³
(Italics ours.)

In *Title Insurance Company v. United States F. & G. Co.*, 121 Cal. App. 73 (76-77), the effect of a decree in another action as evidence against a stranger was also involved; the Court stated:

“If the judgment in the quiet title action brought by Maybrook against Ramos Bros., Incorporated, had the effect of vesting the title of Ramos Bros., Incorporated, in Maybrook, this appeal must fail. . . . The judgment obtained by Maybrook is as conclusive evidence against Ramos Bros., Incorporated, that title was in Maybrook, as if Ramos Bros., Incorporated, had given Maybrook a deed. Like a deed, it was admissible against appellants as a muniment of title to show that *Maybrook through the judgment had acquired the title theretofore held by Ramos Bros., Incorporated.*”⁴ (Italics ours.)

³Please see Appellants' Opening Brief, Appendix, pages 1-3, for extensive quotation from case.

⁴Please see Appellants' Opening Brief, Appendix, pages 3 and 4, for further quotation from case.

In *Perkins v. Benguet*, 55 Cal. App. 720 (132 Pac. (2d) 70), the decree was accepted as conclusive evidence against the defendant as to the ownership of said stock, even though the defendant was not a party to said decree.⁵

The rule announced in the foregoing cases apply alike to title of real or personal property.⁶

Thus the Declaratory judgment itself operated as a transfer of title of the May Film judgment from May Film Corporation to Joe May and through Joe May to the German Bank. It was not necessary for appellants to go behind this decree to establish that May Film Corporation no longer owned the judgment, or that the title thereto became and was vested in the German Bank. The decree itself was sufficient for that purpose.

(3) The Declaratory Judgment Was Admissible in This Action as "A Mument of Title" and Constituted Evidence Against Appellee Even Though Appellee Was Not a Party to That Action.

All questions of evidence, including its admissibility and sufficiency, are, of course, governed by the law of the forum. (*Sayles v. Peters*, 11 Cal. App. (2d) 401, 407 (54 Pac. (2d) 94), 78 A. L. R. 884; also see App. Op. Br. p. 46.)

The leading case which announced the rule that the Declaratory judgment was admissible and constituted evi-

⁵Please see Appellants' Opening Brief, Appendix, pages 4-12, inclusive, for extensive quotation from case.

⁶Please see pages 47, Appellants' Opening Brief, for extensive quotation of authorities.

dence against appellee is *Barr v. Gratz's Executors*, 4 Wheat. 213, 4 L. Ed. 553, wherein Justice Story states the rule as follows:

“Another error alleged is, that the court allowed the decree of the Circuit Court, in the chancery suit between Michael Gratz and John Craig and others, to be given in evidence to the jury. In our opinion this record was clearly admissible. It is true that, in general, judgments and decrees are evidence only in suits between parties and privies. But the doctrine is wholly inapplicable to a case like the present, where the decree is not introduced as *per se* binding upon any rights of the other party, but as an introductory fact to a link in the chain of plaintiff's title, and constituting a part of the muniments of his estate; without establishing the existence of the decree, it would be impossible to establish the legal validity of the deed from Robert Johnson to the lessors of the plaintiffs, which was made under the authority of that decree; and under such circumstances to reject the proof of the decree, would be, in effect, to declare that no title derived under a decree in chancery, was of any validity except in a suit between parties and 221*) privies, so that in* a suit by or against a stranger, it would be a mere nullity. It might with as much propriety be argued that the plaintiff was not at liberty to prove any other title deeds in this suit, because they were *res inter alios acta*.”

Chapman v. Moore, *supra*, cites and follows the *Barr* case. On page 515 the Court states:

“These authorities declare the exception to the general rule to be well established that a party claiming under a judgment is entitled to prove it as a muniment in his chain of title. . . . So with the

judgment. . . . As it was as effective against Patterson's claim of title as if he had made Davis a deed to the property, it was, under the rule heretofore stated, admissible for the same purpose that his deed would have been—as a muniment of title. Being so admissible, it, with the previous concession of legal title in Patterson and the presumption arising therefrom, together with the conveyance from David to plaintiff, established in him *prima facie* title to the property, *which in the absence of any evidence of title in the defendant* would have warranted a judgment in his favor against the defendant Moore, and the finding of the court in the face of this *prima facie* showing that plaintiff was not the owner was not justified by the evidence. . . .” (Italics ours.)

To same effect see *Title Insurance Company v. U. S. F. & G. Co.*, *supra*; *Perkins v. Benguet*, *supra*.

In fact, the rule announced in the foregoing case is of universal application. (See App. Op. Br. pp. 46 and 47 for long list of authorities.)

Therefore, it follows that the Declaratory judgment is evidence herein as “a muniment of appellants' title,” and as such evidence it divested May Film Corp. of the ownership of May Film judgment, and transferred the same to, and established that ownership, firstly, in Joe May and through him in the German Bank.

- (4) The Declaratory Judgment Not Only Was Admissible Against Appellee, but It Was Conclusive Evidence That May Film Corporation Did Not Own the May Film Judgment, and That Title Thereto Had Become and Was Vested in the German Bank. The Declaratory Judgment Admittedly Was Conclusive Between the Parties Thereto, and Since Appellee Contended That May Film Corporation, the Unsuccessful Party, Still Owned the May Film Judgment, Notwithstanding the Decree to the Contrary, Appellee, by Such Assertion, Stood in the Shoes of May Film Corporation, and Like May Film Was Conclusively Bound by Said Declaratory Decree.

When a debtor asserts that the unsuccessful party to a judgment, which has determined ownership of property, is in fact the owner of such property notwithstanding the judgment to the contrary, the debtor thereby becomes conclusively bound by that judgment even though he is not a party thereto. In such case, the debtor by espousing the unsuccessful parties' cause, stands in the shoes of the unsuccessful party, and like that party is conclusively bound by the judgment. This rule is stated, applied and followed in *Perkins v. Benguet*, 55 Cal. App. (2d) 720 (132 Pac. (2d) 70); *Hughes v. United Pipe Lines*, 119 N. Y. 423 (23 N. E. 1042); *Commercial National Bank v. Alloway*, 207 Iowa 419 (223 N. W. 167).

The factual situation in each of these cases are practically identical with the case at bar. In each case it was held that the determination of the ownership of the property in a judgment to which the debtor was not a part was nevertheless conclusive against such debtor in a subse-

quent action where the debtor asserted that the title to the property was in the unsuccessful party to such judgment.

These decisions, we submit, are conclusive against appellee's contention that it is proper for it to collaterally attack the Declaratory judgment. However, appellee's attack upon the Decree, even if proper, was *insufficient to defeat its adjudication*.

Dr. Golm's testimony (even if admissible) simply states that an assignment of the claim from May Film to Joe May was required to vest title in May; that with such assignment the transfer of the claim was valid and complete; that without it nothing passed to May. The record herein—Declaratory relief action—however affirmatively states that May Film actually assigned the claim to May. The "Facts" [R. p. 228] therein refer to, the "grounds for decision" [R. pp. 228-9] therein recite, and the witness therein testified [R. p. 236]: "It is correct that there was assigned to . . . Joe May . . . the claim against Universal. . . ." Dr. Golm stated that "An oral assignment could be sufficient" [R. p. 456]; "that it wasn't necessary that it be written." [R. p. 457.] *The Decree, therefore, is correct under German law under appellee's own testimony.* Dr. Golm's opinion (erroneously admitted over objection [R. pp. 334-5]) that the Decree was erroneous has no probative force and is without value as evidence herein. Both the hypothetical question asked, and the answer given, expressly assumed the absence of facts existing in the record, *i. e.*, that the claim was assigned by May Film to Joe May. That opinion

(even if admissible) is therefore governed by the rule stated in *Barnett v. Atchison Railway Co.*, 99 Cal. App. 310, 317 (278 Pac. 443):

“The opinion of a witness upon assumed facts differing from those shown by the evidence cannot be given any probative force (*Estate of Purcell*, 164 Cal. 300, 308 (128 Pac. 932)), and when such opinion is given in answer to a question which does not take the facts proved into consideration it is without value as evidence.”

To same effect:

Estate of Purcell, 164 Cal. 301, 308 (128 Pac. 932);

San Diego Land Co. v. Neal, 88 Cal. 50, 63 (25 Pac. 977).

(5) It Was Not Necessary for the Appellants to Establish the Facts Upon Which the Declaratory Judgment Was Based. The Facts Adjudicated in, and the Recitals of the Decree Constituted Evidence Herein and the Decree Itself Established the Facts Which It Adjudicated.

In *Perkins v. Benguet*, *supra*, it was held that the New York judgment, therein involved, and every finding upon which it was based was conclusive against the defendant in the California case, with respect to everything therein adjudicated, *i. e.*, *res adjudicata* in the same way as if the defendant had been a party to the New York action, and the New York record and judgment was admitted as competent and conclusive evidence of plaintiff's title.

Further the recitals of the Decree are evidence herein. *Page v. Garver*, 5 Cal. App. 383, 385 (90 Pac. 481), states:

" . . . we are nevertheless of the opinion that where a collateral attack is made, the recitals contained in the judgment are sufficient evidence of the matters therein recited. The judgment may be grossly unjust or erroneous, but the decision of the court as to all issues involved in the action stands as a finality between the parties and their privies until set aside in some mode recognized by law. (Jones on Evidence, Sec. 601.) In such case, where the judgment is one rendered by a court of general jurisdiction, the recitals contained therein constitute evidence of their truth and every intendment must be indulged in support of the judgment."

Simmons v. Threshour, 118 Cal. 100, 101 (50 Pac. 312), states:

"As the record offered . . . was competent evidence of the final adjudication . . . so its recitals . . . were evidence of the facts recited; . . ."

In *Estate of Hunsicker*, 65 Cal. App. 114 (223 Pac. 411), it was held that the contents of a document attached to the petition in an adoption matter and the recitals in the Pennsylvania decree supplied the necessary evidence of jurisdictional facts urged therein to be lacking.

Besides it is well established that a judgment or decree necessarily affirming the existence of any fact is conclusive evidence of that fact when that fact again is in issue. While this rule primarily is one between the parties or privies to the judgment, it also is effective when the judg-

ment is used as a "muniment of title" in another action, and the defendant therein asserts the title to be in the unsuccessful party to the judgment. (*Perkins v. Benguet, supra; Elliott v. Bretsch*, 59 Cal. App. (2d) 543, 549 (139 Pac. (2d) 332); *Murdock v. Eddy*, 38 Cal. App. (2d) 551, 554 (101 Pac. (2d) 722).)

Therefore, when the record of the Declaratory judgment recited that Joe May acquired the claim against Universal; that said claim had been assigned to the German Bank, and that such assignment was valid, those facts were conclusive as between the parties to that action, to-wit, the German Bank and May Film. They also become conclusive in this action against appellee when it asserted that, as between the German Bank, May and May Film Corp., May Film Corp. was still the owner of the May Film judgment notwithstanding the contrary decree. This contention May Film itself could not urge. It was concluded by the decree. Therefore, appellee likewise was concluded. Under its contention it stood in May Film shoes.

The opinion herein also states that there was no evidence of the assignment set forth in the letter dated February 12, 1936 [Pl. Ex. 5]; or that it was ever executed or existed. Again this Court has overlooked certain testimony. Joe May testified at the trial that the assignment, a copy of which is set forth in Exhibit 5, was actually signed by him and delivered to the German Bank. [R. p. 482.] Dr. Lenk also testified that Joe May delivered to the German Bank the assignment of a claim of May Film

v. Universal Pictures Corporation of New York. [R. pp. 280-1, 289.]

Appellants, therefore, established their first link in their chain of title. By the Declaratory judgment the title to the May Film judgment was taken from May Film Corp. and through Joe May was placed in the German Bank. The German Bank, therefore, acquired the *May Film judgment*.

B. THE ASSIGNMENT FROM GERMAN BANK TO MANDL.

This is the second link in appellants' chain of title. This Court, in referring to that assignment, states:

"There was no evidence of any such assignment. Mandl testified that a claim of the German Bank against Bank, but did not testify that the Mayfilm judgment was assigned to him by the German bank or anyone else. There was no evidence that the German bank ever owned the Mayfilm judgment."

Here again we have an illustration of the basic error which has permeated the entire opinion, *i. e.*, an erroneous distinction between the ownership and assignment of the "claim," and the ownership and assignment of the May Film judgment itself. This, we have shown, under both the German and American law to be incorrect. Undoubtedly this error was caused by the fact that this Honorable Court obviously overlooked and failed to consider the oft-repeated evidence—that under German law it is the claim which is assigned; the judgment as such cannot be assigned and that title to the judgment follows title to the claim.

- (1) The Assignment of the Claim Against Universal to Mandl Constituted an Assignment of the May Film Judgment Itself, Since Only the Claim, and Not the May Film Judgment as Such, Could Be Assigned; However, the Title to the May Film Judgment Followed the Title to the Claim. Mandl Therefore Acquired the May Film Judgment.

Mandl testified that after he paid the German Bank upon his guarantee, the said bank gave him an assignment of a certain claim they held against Universal. [R. pp. 263-4, 270.]

This Court's criticism of this assignment was that the testimony disclosed that only an assignment of the claim against Universal was made, but that it failed to disclose any assignment of the May Film judgment itself.

This criticism is without valid basis, because in making such statement this Court failed to consider the fact that under German law it was the claim, not the judgment, which was assigned, and that the title to the judgment followed the title to the claim. Therefore, when Mandl stated that the claim against Universal was assigned to him by the German Bank, this assignment as a matter of law transferred the May Film judgment to him. Evidence similar to Mandl's testimony has been upheld as sufficient to establish an assignment. In *Bank of Italy v. Bettencourt*, 214 Cal. 571, 575-6 (7 Pac. (2d) 174), the Supreme Court of California held that the following question, "Did the Bank of Italy purchase the Bank of Moon Bay and its properties?" and the answer thereto, "Yes," was sufficient to uphold the transfer and succession to the

properties. In holding that the objection thereto was only technical, the Court stated:

"No attempt was made by appellants to show by cross examination, or otherwise, that plaintiff was not the owner of said notes. Surely no other action could be maintained to compel a second payment of the notes."

In *Brown v. Patella*, 24 Cal. App. (2d) 362 (75 Pac. (2d) 119), testimony that a note was handed to a party and he was told to "endorse an assignment to one A. B. Brown" and to have it executed, was held sufficient to support an assignment of the note, even though no such assignment was endorsed upon it.

The lower Court held such evidence insufficient and the Appellate Court reversed the judgment in favor of the defendant.

And so in the case at bar. Appellee made no attempt by cross-examination, or otherwise, to disprove the assignment testified to by Mandl, nor to inquire into the mechanics or formalities by which it was made. Furthermore, appellee's witness admitted that the German Bank was obligated to assign the claim to Mandl [R. pp. 354-6] who was entitled to receive it. [R. p. 371.]

This evidence is particularly sufficient since appellee is fully protected under both the German and American law from further claim by or liability to the Bank. Both the assignment and the "notice" from the German Bank [Pl. Ex. 11, R. pp. 295-7] under German law, Section 409 [R. p. 439], also Golm's testimony [R. pp. 349, 428], completely protects the appellee from "double" liability; and under American law, both the assignment and the

notice which itself constitutes an equitable assignment, affords appellee the same full protection.

The appellee's rights are therefore governed by the following rule stated in *Bartlett Estate Co. v. Fraser*, 11 Cal. App. 373, 376 (105 Pac. 130):

“ . . . appellant is fully protected from further litigation or liability in connection with any claim of the bank on the paper, and this should be the full measure of his right to enforce proof of assignment, or to question its validity.”

(See also Op. Br. pp. 67, 84.) It is also significant that prior to suit appellee denied liability *solely on other grounds*. [Pl. Ex. 13, R. pp. 520-22; Deft. Ex. B, R. p. 308.]

There can be no valid criticism of the assignment, because of any uncertainty or error as to the date of the assignment. The evidence shows that it was made *after* Mandl paid his guarantee to the German Bank. [R. p. 270.] This was sometime in 1936. The *fact* of an assignment, *not* the *date* thereof, governs; and if there is an erroneous date given, the date may be disregarded where the contents and the surrounding circumstances sufficiently describe the claim actually transferred, without the date. *Binford v. Boyd*, 178 Cal. 458, 464 (174 Pac. 56.) This principle is especially applicable herein.

Neither was it necessary to produce the original assignment. *No objection was interposed on that ground*, nor was that the basis of the trial court's decision; besides, its whereabouts was unknown. [R. p. 264.] Wherever it was, it was clear from the testimony [R. p. 262] that it was *beyond the jurisdiction of the Court*. Secondary evidence, therefore, was proper.

In *Burton v. Driggs*, 20 Wall. 125, 134, 22 L. Ed. 299, 302, Mr. Justice Swayne, after ruling that secondary evidence of a written document was admissible in the absence of a specific objection, stated the following rule:

"In the present case the witness lived in another State and more than one hundred miles from the place of trial. The process of the court could not reach him; for all jurisdictional purposes he was as if he were dead. It is well settled that if books or papers necessary as evidence in a court in one State be in the possession of a person living in another state, *secondary evidence, without further showing, may be given to prove the contents of such papers, and notice to produce them is unnecessary.*" (Italics ours.)

In *Mackroth v. Sladky*, 27 Cal. App. 112, 199 (148 Pac. 978), the rule is stated as follows:

"The trial court did not err in its ruling permitting secondary evidence of the contents of the plaintiff's letter introducing the defendant to de Castro. It was established in evidence that this letter was written and addressed by the plaintiff to de Castro in Mexico. De Castro testified that the letter, if it was still in existence, was at the time of the trial among his private papers in Mexico; and 'a letter that is beyond the territory of the state is, within the meaning of the statute, "lost" so as to allow secondary proof of its contents.' (*Zellerbach v. Allenberg*, 99 Cal. 57, 73 (33 Pac. 786, 791).)"

The factual situation in the foregoing case and the case at bar are strikingly similar. Here Mandl testified that he did not know where the assignment was. [R. p. 264.] He testified, however, that certain documents and

letters were in Vienna at that time. [R. p. 262.] To same effect:

Zellerbach v. Allenberg, 99 Cal. 57-73 (33 Pac. 786);

Gordon v. Searing, 8 Cal. 49;

20 *Am. Jur.* 386, Par. 434.

The trial court also stated:

" . . . I am willing to agree that any document in Germany may be proved by *secondary* evidence because of the war conditions. . . ." [R. p. 474.]

We therefore submit that appellee's objection to, and this Court's criticism of the assignment from Bank to Mandl have been completely answered.

(2) **Even if Mandl's Testimony Were Deemed Insufficient to Show an Actual Assignment, Nevertheless, the Letter Dated February 12, 1936 (Plaintiff's Exhibits 5 and 11) from the German Bank to Universal, by Itself Was Sufficient to Transfer the May Film Judgment From German Bank to Mandl.**

This document [Pl. Exs. 11 and 5] was more than a mere "notice." It contained a recital of the transactions had; recited that the claim against Universal had been transferred to Mandl, and directed Universal to pay the claim to Mandl, and stated that the debt could only be satisfied by the payment to Mandl. This letter, coupled with the fact that Mandl by paying the Bank upon his guaranty was entitled to receive the May Film judgment and that the German Bank was obligated to assign it to him, clearly establishes the letter as an equitable *assignment*. As such it transferred the claim, and therefore May Film judgment to Mandl.

As stated in *Walmsley v. Holcomb*, 61 Cal. App. (2d) 578, 584 (143 Pac. (2d) 398):

“In order to constitute an equitable assignment of a debt, no express words to that effect are necessary. If from the entire transaction it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment will be held to have taken place. (See also, *Goldman v. Murray*, 164 Cal. 419, 422 (129 P. 462).)”

It is, of course, well established, that the order, direction or request of a creditor to his debtor that the latter shall pay money due to the former to a third party constitutes an equitable assignment, and vests the ownership of the funds in the third person, with the right to prosecute the action against the debtor for the recovery thereof. (*Porterbaugh v. McCray*, 25 Cal. App. 468, 471 (144 Pac. 149).)⁷

The same rule is also applicable in New York. (*Hinkle Iron Company v. Cohen*, 229 N. Y. 179 (128 N. E. 133).)⁸

Most certainly appellee could not complain of such interpretation of the letter, because under German law, Section 409, German Civil Code [R. p. 439], the German Bank no longer could collect the debt from appellee. It was estopped from doing so. It had divested itself of that right. [R. pp. 349, 428.] As an assignment appellee also would be fully protected under American law.

⁷Please see Appellants' Opening Brief, pages 64 and 65, for extensive list of authorities.

⁸Please see Appellants' Opening Brief, page 66, for extensive citation of authorities.

The letter constituted an assignment upon a further ground. It authorized Mandl to collect the German judgment from appellee. This, coupled with the fact that Mandl was entitled to the proceeds of said judgment because he had parted with value, constituted an agency coupled with an interest. This also was sufficient as an assignment. (*Rufe v. Commercial Bank, supra; Hunt v. Rousmanier's Adms.*, 8 Wheat. 205, 5 L. Ed. 597; 3 Cal. Jur. 266.)

We therefore submit that for the various reasons hereinbefore stated, there was an assignment of May Film judgment from the Bank to Mandl.

The German Bank at the time of said assignment did own the May Film judgment. The Bank was declared to be the owner of the claim by virtue of the Declaratory judgment. This was an adjudication that it was the owner of the May Film judgment. Furthermore, since the claim which was referred to in the letter had then actually been merged into, and was then evidenced by the May Film judgment, this, as a matter of law, amounted to an assignment of the May Film judgment itself. The claim and the judgment were inseparable. (*Rufe v. Commercial Bank, supra.*)

(3) Even if There Was No Actual or Equitable Assignment, Mandl Acquired the Mayfilm Judgment by Operation of Law.

The evidence is uncontradicted that the German Bank made a loan to May Film Corporation. [R. pp. 273-4, 279-80, 258.] That Joe May and Mandl were guarantors of said loan. [R. pp. 261-2, 280-1.] That May assigned the May Film judgment to the German Bank [R. pp. 482, 280-1, 289]; that this assignment was by way of security

for the May Film obligation [R. p. 246]; that Mandl paid the loan under his guaranty. [R. pp. 262-3, 270.]

Appellee's witnesses conceded that under these facts that the German Bank was obligated to assign the May Film claim to Mandl [R. pp. 354-6] and that Mandl was entitled to receive it [R. pp. 371, 354-6]; that the "notice" to Universal by the Bank fully protected Universal against further claim by the Bank. [R. pp. 349, 428.]

Under German law these facts transferred the May Film judgment to Mandl by operation of law. Section 774, German Civil Code, provides:

" . . . that the claim of the creditor against the principal debtor is transferred to him . . . "

the paying guarantor.

Section 401, German Civil Code, provides:

" . . . with the assigned claim the mortgages or liens belong to it, as well as the rights arising out of a security given for it, are transferred to the assignee." [R. p. 434.]

Thus, we submit, that if by no other means, the May Film judgment was transferred to Mandl *by operation of German law*, and thereby became the legal owner by the May Film judgment.

Appellants therefore established their second link in their chain of title which placed the ownership of May Film judgment in Mandl.

C. THE ASSIGNMENT FROM MANDL TO UNION BANK.

This is the third link in appellants' chain of title. It was evidenced by Plaintiff's Exhibit 6. [R. pp. 254-6.] This Court in its opinion states:

"The evidence showed that on April 22, 1936, Mandl executed what purported to be an assignment to Union Bank, but that was not, and did not purport to be, an assignment of the Mayfilm judgment. It purported to be an assignment of a claim. There was no evidence that Mandl ever owned the Mayfilm judgment."

Again we respectfully submit that this statement is incorrect. Again this Court has made an unwarranted distinction between the assignment of the claim, and the assignment of the judgment. This is not permitted under either American or German law. Again this Court has overlooked important evidence. That portion of the opinion which stated that there was no evidence that Mandl ever owned the May Film judgment, obviously is based upon the assumption that the various assignments of the claim against Universal and the adjudication of the ownership of the claim in the Declaratory judgment, were insufficient to pass the title to the May Film judgment itself. This theory has clearly been demonstrated by the evidence and the applicable law to be incorrect.

- (1) There Was No Issue as to the Sufficiency of the Assignment From Mandl to Union Bank During the Trial. Appellee Conceded That It Was Sufficient to Transfer Mandl's Interest in the May Film Judgment to the Union Bank if Mandl Had Any Ownership in the Judgment.

This assignment was never questioned at the trial. In fact its sufficiency was conceded by both Court and counsel. The trial court in its opinion stated [R. p. 30]:

"Mandl assigned to Union Bank and Trust Company of Los Angeles, who assigned to plaintiffs. These last two assignments not being questioned, the problem calls for the determination of two questions only."

When the said assignment was offered in evidence, appellee's counsel conceded its sufficiency:

"Mr. Blum: This is the assignment from Fritz Mandl to (41) the Union Bank, and the translation.

Mr. Selvin: As an assignment, I have no objection to it, but I object to it if it is offered to prove the truth of any of the recitals upon the ground that they are self-serving and not binding upon the defendant. They have the habit, in these things, to tell the whole history whenever they start to show an assignment.

The Court: They are no worse than our 'where-ases.'

Mr. Selvin: I object to the document if it is offered for the truth of any of the recitals. As far as an assignment from Mandl to the Bank is concerned, I am willing to stipulate that if Mandl had anything he assigned it to the Union Bank, but I won't stipulate that he owned anything at the time he assigned it.

Mr. Hirschfeld: That is all right.

The Court: I cannot single out any recital from the ultimate facts which are set forth. The assignment and the translation will be received as one exhibit.

* * * * *

The Court: It may be received as Exhibit 6 in evidence." [R. pp. 253-4.]

Thus it becomes apparent that this Court created an issue as to this assignment when in fact no issue existed at the trial below. Nevertheless we submit that this Court's determination thereof is erroneous.

(2) The Assignment by Mandl of the Claim Against Universal to Union Bank Was in Fact Sufficient to and Did Transfer the May Film Judgment to the Union Bank.

It must be remembered when this assignment was made the claim against Universal was then merged into and evidenced by the May Film judgment itself. Therefore, the assignment of the claim transferred with it the ownership of the May Film judgment itself. As stated in *Rufe v. Commercial Bank, supra*:

"By whatever terms the assignment was made, if the debt passed, all rights and remedies for its collection also passed with it. The right to the debt, as evidenced by the judgment against the defendants, cannot exist in the hands of different persons. One cannot hold the judgment and another the debt. They are inseparable. . . . So when the instrument passed the whole sum evidenced in the judgment . . . with that passed 'also all the rights and remedies for its recovery and collection'; that is to say, the judgment and its incidents."

To same effect :

Ashburn v. MacDonald, supra;

Batesville v. Kaufmann, supra;

North v. Evans, supra;

Brown v. Scott, supra;

Pattison v. Hull, supra;

Bolan v. Crosby, supra.

Obviously the author of said assignment was familiar with the German law to the effect that only the claim could be assigned, that the judgment as such could not be, and that title to the judgment followed title to the claim. Hence the terminology of said assignment. This, however, did not invalidate the assignment or render it insufficient, for under American law the judgment followed the claim. The same rule was applicable under German law. In either case the May Film judgment itself was transferred from Mandl to Union Bank.

This Court's comment upon the assignment with an observation that two claims are specified therein and that the Court does not know one or two claims were assigned to the Union Bank, is undoubtedly due to the fact that this Court has overlooked explanatory evidence.

- (3) The Term "This Claim" Mentioned in the Said Assignment Clearly Refers to the Claim Against Universal, but if Any Ambiguity Exists in Said Assignment, the Evidence Clearly Discloses That Mandl Intended to and Did Assign the Claim Against Universal Which Carried With It the May Film Judgment Itself.

Interpreting the assignment within its four corners, we submit that "this claim" can only refer to the claim against Universal.

The word "this" is a demonstrative word and refers to the subject that is most clearly related and the nearest to it in location.

The term in the assignment nearest to the expression "this claim" are the words "including the claim against Universal has been transferred to me, Fritz Mandl"; the term "this claim" must therefore refer to that claim, to-wit, claim against Universal; however, the testimony of Fritz Mandl himself clearly shows that by his assignment, he intended to and did transfer to the Union Bank the claim against Universal.

"Q. I show you a document, plaintiff's Exhibit 2 for identification, and ask you whether it is your signature?"

Mr. Selvin: That is already in evidence as plaintiffs' Exhibit 6 isn't it? It is the assignment from Mandl to the Union Bank.

Mr. Hirschfeld: Yes.

The Court: All right.

A. Yes.

Q. Do you recall when you executed this document? A. Yes, 1936.

Q. I show you the document marked plaintiffs' Exhibit 2 for identification and ask you when you affixed your signature? A. On April 22, 1936.

Q. And what does this document represent?

Q. *Is this document an assignment by you of certain claims against Universal Pictures Corporation to the Union Bank and Trust Company of Los Angeles?*

Mr. Selvin: The document will speak for itself.

The Court: Do you insist on the objection? (57)

Mr. Selvin: I do. I think the document speaks for itself.

The Court: Well, he may identify it. Objection overruled.

A. Yes.

Mr. Taub: I offer it in evidence.

That is the document which has been received as plaintiffs' Exhibit 6.

Q. This assignment which you made to the Union Bank and Trust Company originated as an assignment to you from the Bank for Foreign Commerce in Berlin, is that correct?

* * * * *

A. Yes, the same thing." [R. pp. 268-9, 270.]
(Italics ours.)

- (4) It Is Also Fundamental That the Language of an Assignment Must Be Construed With Reference to the Facts and Circumstances of the Particular Case. The Circumstances Under Which an Assignment Was Made May Be Considered in Determining the Meaning and Scope Where the Terms and Understanding Are Ambiguous.

Adamson v. Paonessa, 180 Cal. 157, 164 (179 Pac. 880);

Austin v. Hallmark Oil Co., 21 Cal. (2d) 719, 730;

Curtain v. Kozewsky, 145 Cal. 431 (78 Pac. 962).

- (5) It Is Also Elemental That in Determining the Scope and Effect of an Assignment, It Must Be Construed so as to Render It Valid, or Result in Effectuating the Manifest Intention of the Parties.

3 Cal. Jur. 283.

- (6) It Is Also Fundamental That Both Where the Assignor and the Assignee Admit and Concede That the Assignment Has Been Made, the Debtor Cannot Question the Validity or the Effectiveness Thereon.

Dorner v. Hefner, 15 Cal. App. (2d) 97, 101;
58 Pac. (2d) 1308;

Van Dyke v. Gardner, 49 N. Y. Sup. 328, 22
Misc. 113.

We therefore submit that the evidence herein disclosed, when interpreted in the light of the applicable law, that appellants established their third link in the chain of title, to-wit: the transfer of May Film judgment from Mandl to Union Bank.

D. THE ASSIGNMENT FROM UNION BANK TO APPELLANTS.

This assignment [Pl. Ex. 8, R. p. 258] was not questioned below, or by this Court, except that this Court states that there was no evidence to show Union Bank owned the May Film judgment. This statement was based upon the theory adopted by this Court that the various assignment of the *claim* against Universal was not an assignment of the May Film judgment itself. This we have shown in the preceding portions of this Petition to be incorrect. We have already shown that Union Bank did in fact own the May Film judgment when it made its assignment to appellants.

This completes appellants' chain of title, and established their ownership to the May Film judgment. Appellants, therefore, are entitled to recover.

IV.

The Opinion Herein Fails to Disclose or Pass Upon Various Points Urged by Appellants in Their Briefs. A Full Consideration of These Points Are Necessary for a Complete Determination of this Case.

It would unduly extend this Petition to again reiterate the various points set forth in appellants' briefs. We therefore make reference to the various points urged in appellants' briefs, in the firm belief that this Honorable Court will reconsider and re-examine the same in the determination of this Petition.

Conclusion.

If this petition may seem of unusual length, we respectfully ask the Court's kind indulgence. We sincerely believe that only by a thorough presentation of the evidence and the law can we adequately demonstrate to this Court that the opinion herein is basically incorrect. We respectfully contend that this Court in examining the judgment herein overlooked important evidence upon vital issues and failed to consider all of the testimony in determining this appeal. We also sincerely believe that the Court was acting under a misapprehension as to both the German and the American law, and that but for such factors, this Court would never have affirmed the opinion. We respectfully submit that the evidence herein when viewed in the light of the applicable law is fully sufficient to establish appellants' ownership to the Mayfilm Judgment and that appellants are entitled to recover herein.

We therefore respectfully submit that this Petition for a Rehearing should be granted; that this cause be again restored to the calendar and that upon a re-determination of this appeal, the judgment herein be reversed.

Respectfully submitted,

ELLIS I. HIRSCHFELD,

SAMUEL W. BLUM,

Attorneys for Appellants.

CERTIFICATE OF COUNSEL.

We, counsel for the appellants, John Luhring and Margaret Morris, do, and each of us does, hereby certify that the foregoing Petition for Rehearing of this cause in our opinion is well founded and not interposed for delay.

ELLIS I. HIRSCHFELD,

SAMUEL W. BLUM,

Attorneys for Appellants.

United States
Circuit Court of Appeals
For the Ninth Circuit. 6

DENZEL RIDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Arizona

FILED

APR 1 - 1943

PAUL P. O'BRIEN,
CLERK

No. 10335

United States
Circuit Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Old Post Office Building,

Phoenix, Arizona.

Attorneys for Appellee. [3*]

In the District Court of the United States
for the District of Arizona

No. C 6276 Phoenix

UNITED STATES OF AMERICA,
Plaintiff,
vs.

DENZEL LANE, alias DENZEL RIDER, alias
DENZEL MORGAN,
Defendant.

INDICTMENT

Viol: 38 U.S.C. 510 and 714
(Unlawfully receiving compensation)

In the District Court of the United States in and
for the District of Arizona, At the March term
thereof, A.D. 1942.

The Grand Jurors of the United States, impaneled, sworn, and charged at the term aforesaid, of the Court aforesaid, on their oath present, that Denzel Lane, alias Denzel Rider, alias Denzel Morgan, on or about June 30, 1940, and within the said District of Arizona, did wrongfully, unlawfully and fraudulently receive compensation from the United States as the unremarried widow of one Arthur C. Rider, deceased, which said compensation was received as follows, to-wit: that the said defendant did then and there wrongfully, unlawfully and fraudulently receive a check duly drawn on the Treas-

ury of the United States in the sum of \$30.00, payable to the order of Mrs. Denzel Rider, as the unremarried widow of the said Arthur C. Rider, which said check was duly executed and issued under the provisions of Sections 503 and 504, Title 38, U.S. C.A.; that said defendant did, upon receipt of said check, then and there endorse the same and receive the proceeds thereof as aforesaid, to-wit, the sum of \$30.00; that at said time and place said defendant was not entitled to receive said check or the proceeds therefrom, she then and there not being the unremarried widow of Arthur C. Rider, and that she then and there wrongfully, unlawfully and fraudulently received said check and the proceeds therefrom with the intent to defraud the United States; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Second Count: And the Grand Jurors aforesaid, on their oath aforesaid, do further present that Denzel Lane, alias Denzel Rider, alias Denzel Morgan, on or about July 31, 1940, and within the said District of Arizona, did wrongfully, unlawfully and fraudulently receive compensation from the United States as the unremarried widow of one Arthur C. Rider, deceased, which said compensation was received as follows, to-wit: that the said defendant did then and there wrongfully, unlawfully and fraudulently receive a check duly drawn on the Treasury of the United States in the sum of \$30.00, payable [4] to the order of Mrs. Denzel Rider, as the unremarried widow of the said Arthur C.

Rider, which said check was duly executed and issued under the provisions of Sections 503 and 504, Title 38, U.S.C.A.; that said defendant did, upon receipt of said check, then and there endorse the same and receive the proceeds thereof as aforesaid, to-wit, the sum of \$30.00; that at said time and place said defendant was not entitled to receive said check or the proceeds therefrom, she then and there not being the unremarried widow of Arthur C. Rider, and that she then and there wrongfully, unlawfully and fraudulently received said check and the proceeds therefrom with the intent to defraud the United States; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Third Count: And the Grand Jurors aforesaid, on their oath aforesaid, do further present that Denzel Lane, alias Denzel Rider, alias Denzel Morgan, on or about August 31, 1940, and within the said District of Arizona, did wrongfully, unlawfully and fraudulently receive compensation from the United States as the unremarried widow of one Arthur C. Rider, deceased, which said compensation was received as follows, to-wit: that the said defendant did then and there wrongfully, unlawfully and fraudulently receive a check duly drawn on the Treasury of the United States in the sum of \$30.00, payable to the order of Mrs. Denzel Rider, as the unremarried widow of the said Arthur C. Rider, which said check was duly executed and issued

under the provisions of Section 503 and 504, Title 38, U.S.C.A.; that said defendant did, upon receipt of said check, then and there endorse the same and receive the proceeds thereof as aforesaid, to-wit, the sum of \$30.00; that at said time and place said defendant was not entitled to receive said check or the proceeds therefrom, she then and there not being the unremarried widow of Arthur C. Rider, and that she then and there wrongfully, unlawfully and fraudulently received said check and the proceeds therefrom with the intent to defraud the United States; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Fourth Count: And the Grand Jurors aforesaid, on their oath aforesaid, do further present that Denzel Lane, alias Denzel Rider, alias Denzel Morgan, on or about September 30, 1940, and within the said District of Arizona, did wrongfully, unlawfully and fraudulently receive compensation from the United States as the unremarried widow of one Arthur C. Rider, deceased, which said compensation was received as follows, to-wit; that the said defendant did then and there wrongfully, unlawfully and fraudulently receive a check duly drawn on the Treasury of the United States in the sum of \$30.00, payable to the order of Mrs. Denzel Rider, as the unremarried widow of the said Arthur C. Rider, which said check was duly executed and issued under the provisions of Sections 503 and 504, Title 38, U.S.C.A.; that said defendant did, upon receipt of said check, then and there endorse

the same and receive the proceeds thereof as aforesaid, to-wit, the sum of \$30.00; that at said time and place said defendant was not [5] entitled to receive said check or the proceeds therefrom, she then and there not being the unremarried widow of Arthur C. Rider, and that she then and there wrongfully, unlawfully and fraudulently received said check and the proceeds therefrom with the intent to defraud the United States; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Fifth Count: And the Grand Jurors aforesaid, on their oath aforesaid, do further present that Denzel Lane, alias Denzel Rider, alias Denzel Morgan, on or about October 31, 1940, and within the said District of Arizona, did wrongfully, unlawfully and fraudulently receive compensation from the United States as the unremarried widow of one Arthur C. Rider, deceased, which said compensation was received as follows, to-wit: that the said defendant did then and there wrongfully, unlawfully and fraudulently receive a check duly drawn on the Treasury of the United States in the sum of \$38.00, payable to the order of Denzel Rider, as the unremarried widow of the said Arthur C. Rider, which said check was duly executed and issued under the provisions of Sections 503 and 504, Title 38, U.S. C.A.; that said defendant did, upon receipt of said check, then and there endorse the same and receive the proceeds thereof as aforesaid, to-wit, the sum of

\$38.00; that at said time and place said defendant was not entitled to receive said check or the proceeds therefrom, she then and there not being the unremarried widow of Arthur C. Rider, and that she then and there wrongfully, unlawfully and fraudulently received said check and the proceeds therefrom with the intent to defraud the United States; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Sixth Count: And the Grand Jurors aforesaid, on their oath aforesaid, do further present that Denzel Lane, alias Denzel Rider, alias Denzel Morgan, on or about November 30, 1940, and within the said District of Arizona, did wrongfully, unlawfully and fraudulently receive compensation from the United States as the unremarried widow of one Arthur C. Rider, deceased, which said compensation was received as follows, to-wit: that the said defendant did then and there wrongfully, unlawfully and fraudulently receive a check duly drawn on the Treasury of the United States in the sum of \$38.00, payable to the order of Denzel Rider, as the unremarried widow of the said Arthur C. Rider, which said check was duly executed and issued under the provisions of Sections 503 and 504, Title 38, U.S.C.A.; that said defendant did, upon receipt of said check, then and there endorse the same and receive the proceeds thereof as aforesaid, to-wit, the sum of \$38.00; that at said time and place said defendant was not entitled to receive said check or the

proceeds therefrom, she then and there not being the unmarried widow of Arthur C. Rider, and that she then and there wrongfully, unlawfully and fraudulently received said check and the proceeds therefrom with the intent to defraud the United States; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

F. E. FLYNN,

United States Attorney for
the District of Arizona. [6]

Indictment

A True Bill,

C. E. LAWRENCE,
Foreman.

[Endorsed]: Filed Jul. 16, 1942. [7]

In the United States District Court
for the District of Arizona

April 1942 Term.

At Phoenix.

MINUTE ENTRY OF FRIDAY, JULY 31, 1942

(Phoenix Division)

Honorable Albert M. Sames, United States District Judge, Presiding.

[Title of Cause.]

The Defendant, Denzel Lane, is present in person with her counsel, Robert R. Weaver, Esquire, and on motion of said counsel,

It Is Ordered that V. L. Hash, Esquire, be entered as associate counsel for the defendant.

The defendant is now duly arraigned, and now files motion to quash the indictment. Said motion is now duly argued and submitted to the Court, and

It Is Ordered that said motion to quash be and it is denied, to which ruling and order of the court the defendant excepts.

The defendant waives the reading of the indictment, a copy thereof having heretofore been furnished the defendant. The defendant's plea is not guilty, which plea is now duly entered, and

It Is Ordered that this case be continued to be set for trial. [8]

In the United States District Court for the
District of Arizona

October 1942 Term

At Phoenix.

MINUTE ENTRY OF THURSDAY,
DECEMBER 3, 1942

(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, Presiding.

[Title of Cause.]

This case comes on regularly for trial this day. Frank E. Flynn, Esquire, United States Attorney and E. R. Thurman, Esquire, Assistant United States Attorney, appear for the Government. The

defendant, Denzel Lane, is present in person with her counsel Robert R. Weaver, Esquire and George Wilson, Esquire. Louis L. Billar is present as Court reporter.

Both sides announce ready for trial.

Counsel now stipulate that trial may proceed with a panel of 26 veniremen and that the Government will waive 2 peremptory challenges. Examination of veniremen on *voire dire* is now had, and both sides pass the panel. On motion of Robert R. Weaver, Esquire, Counsel for the defendant.

It Is Ordered that said George Wilson, Esquire, be entered as associate counsel for the defendant.

A lawful Jury of twelve men is now duly empaneled and sworn to try this case.

The said Assistant United States Attorney now reads aloud the indictment to the jury and thereafter said counsel for the Government states to the Jury the defendant's plea of Not Guilty to said indictment.

Thereupon, It Is Ordered that all jurors not empaneled in the trial of this case be excused until further order.

Government's Case:

Dorothy Titcomb is now sworn and examined on behalf of the Government. [9]

The following Government's exhibits are now admitted in evidence:

1. Affidavit for marriage license
2. Marriage license and certificate

Gordon Farley is now sworn and examined on behalf of the Government.

The following Government's exhibits are now admitted in evidence:

3. Specimen of signature
4. Letter addressed to Gordon Farley and a reply thereto

J. P. Gross is now sworn and examined on behalf of the Government.

The following Government's exhibits are now admitted in evidence:

5. Application for benefit
6. Award of compensation
7. Copies of checks
8. Letter

And thereupon, at 11:55 o'clock a. m., It Is Ordered that the *further* of this case be continued until 2:00 o'clock p. m. this date, to which time the Jury being first duly admonished by the Court, the defendant and counsel are excused.

Subsequently, at 2:00 o'clock p. m., the Jury and all members thereof, the defendant and counsel for the respective parties being present pursuant to recess, further proceedings of trial are had as follows:

Government's Case Continued:

J. P. Gross heretofore sworn is now recalled and further examined on behalf of the Government.

Whereupon, the Government rests.

Defendant's Case:

Denzel Rider is now sworn and examined in her own behalf.

And the defendant rests.

Both sides rest.

Counsel for the defendant moves for a directed verdict on account of insufficient evidence, and [10]

It Is Ordered that said motion be and it is denied.

All the evidence *being, the* case is argued by respective counsel to the Jury. Whereupon, the Court duly instructs the Jury and said Jury retire at 3:50 o'clock p.m. in charge of two sworn bailiffs to consider of their verdict.

Subsequently, the defendant and all counsel being present, the Jury return in a body into open court at 4:10 o'clock p.m., and all members thereof being presnt, are asked if they have agreed upon a verdict. Whereupon, the Foreman reports that they have agreed and presents the following verdict, to-wit:

“UNITED STATES OF AMERICA,

Plaintiff,

Against

DENZEL LANE, alias DENZEL RIDER, alias
DENZEL MORGAN,

Defendant.

C-6276

VERDICT

We, The Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant Denzel Lane guilty as charged in count one of the indictment, guilty as charged in count two of the indictment, guilty as charged in count

three of the indictment, guilty as *charge* in count four of the indictment, guilty as *charge* in count five of the indictment, and guilty as charged in count six of the indictment,

S. B. COOPER,
Foreman."

The verdict is read as recorded and no poll being desired by either side, the Jury is discharged from the further consideration of this case and excused from further jury service until further order.

It Is Ordered that this case be set for sentence Monday, December 7, 1942 at ten o'clock a.m. [11]

In the United States District Court
for the District of Arizona

October 1942 Term

At Phoenix.

MINUTE ENTRY OF MONDAY,
DECEMBER 7, 1942

(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, Presiding.

[Title of Cause.]

This case comes on regularly for sentence this day.

The defendant, Denzel Lane, is present in person with her counsel, George Wilson, Esquire, and no legal cause appearing why judgment should not now be imposed, the Court renders judgment as follows:

C-6276

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DENZEL LANE, alias DENZEL RIDER, alias
DENZEL MORGAN,

Defendant.

JUDGMENT

Due proceedings having been had on the indictment filed herein presented against the defendant above named charging a violation of Title 38, Sections 510 and 714, United States Code, to-wit: wrongfully, unlawfully and fraudulently receive certain compensation from the United States with the intent to defraud the said United States, as charged in each of counts one to six of said indictment.

It appearing to the Court that the best interests of the defendant and the Government will be subserved thereby, [12]

It Is Ordered that the imposition of judgment and sentence herein be suspended for the period of five (5) years from and after this date and that said defendant be placed on probation during said period, on condition that she make restitution of the money unlawfully received, within six months from this date.

Dated December 7, 1942.

DAVE W. LING,
Judge. [13]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant:

Denzel Rider, 1452 East Fillmore Street, Phoenix,
Arizona.

Name and Address of Appellant's Attorneys:

Geo. T. Wilson, 707 Title & Trust Bldg., Phoenix,
Arizona.

R. C. Weaver, First National Bank Bldg.,
Phoenix, Arizona.

Offense:

Violation of Sections 510 and 714 Title 38 U.S.C.,
unlawfully receiving compensation from the United
States of America as the unremarried widow of
Arthur C. Rider.

Date of Judgment:

December 7, 1942.

Description of Judgment of Sentence:

That defendant is guilty as charged in the indictment and that imposition of sentence be suspended for a period of five years from the date of said judgment, conditioned that defendant repay to the United States of America the amount of compensation received by her since June 14, 1939, as the unremarried widow of Arthur C. Rider, deceased.

Name of Prison:

Defendant at liberty under the terms of the suspended sentence.

I, the above named appellant hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit [14] from the judgment above mentioned on the grounds set forth below.

1. That the Court erred in refusing to permit defendant to testify to the facts as substantially set forth in her offer of proof on file herein and in sustaining the objection of the prosecution thereto on the grounds that the facts set forth in said offer of proof were material and relevant on the issue of defendant's intent.

DENZEL RIDER,
Appellant.

Dated this 12th day of December, 1942.

R. C. WEAVER

GEO. T. WILSON

Attorneys for Appellant.

Copy received 12/12/42.

F. E. FLYNN,

U. S. Atty.

[Endorsed]: Filed Dec. 12, 1942. [15]

In the United States District Court
for the District of Arizona

October 1942 Term

At Phoenix.

MINUTE ENTRY OF SATURDAY,
DECEMBER 12, 1942

(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

No counsel appears for the Government. George
Wilson, Esquire, appears as counsel for the defend-
ant and now files defendant's Notice of Appeal, and

It Is Ordered that the defendant's Cost and bail
bond on appeal be fixed in the penal sum of
\$1250.00, and

It Is Further Ordered that counsel for both sides
appear before the Court on December 21, 1942, at
ten o'clock a.m. for such directions as may be ap-
propriate with respect to the preparation of the rec-
ord on appeal in this case. [16]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents:

That we, Denzel Lane alias Densel Rider alias
Denzel Morgan, as principal, and United States

Fidelity and Guaranty Company as surety, are held firmly and bound unto the United States of America in the full and just sum of Twelve Hundred and Fifty (\$1250.00) Dollars to be paid to the said United States of America, to which payment well and truly to be made, we bind ourselves, our lawful successors and assigns, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seal and dated this 23rd day of December, in the year of our Lord One Thousand Nine Hundred and Forty Two.

Whereas, lately in the October term A. D. 1942 of the District Court of the United States for the District of Arizona in a suit pending in said Court between the United States of America as plaintiff, and Denzel Lane alias Denzel Rider alias Denzel Morgan, as defendant, a judgment was rendered against the said Denzel Lane alias Denzel Rider alias Denzel Morgan, and said defendant has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and sentence in the aforesaid suit, and notice of the said appeal, in duplicate, having been filed with the clerk of the aforesaid District Court of the United States for the District of Arizona and a copy of such appeal having been duly served upon the United States Attorney for the District of Arizona, in the manner and within the time required by law and the rules of Court in such [17] cases made and provided.

Now, the condition of the above obligation is such that if the said Denzel Lane alias Denzel Rider alias

Denzel Morgan, shall appear in the United States Circuit Court of Appeals for the Ninth Circuit in San Francisco, State of California, on such day or days as may be appointed for the hearing of said *cuase* in said Court, and upon such day or days may be appointed by said Court until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender herself in execution of the judgment and sentence of said District Court of the United States for the District of Arizona if said judgment against her shall be affirmed by the said United States Circuit Court of Appeals for the Ninth Circuit, then above obligation shall be void, otherwise to remain in full force and effect.

Now, therefore, and as a further condition of this bond, that if the said Denzel Lane alias Denzel Rider alias Densel Morgan, appellant above named, shall prosecute her appeal to the effect and shall pay all the taxable costs on appeal if she fails to make her appeal good, then above obligation shall be void, otherwise to remain in full force and effect.

And the surety in this obligation hereby covenants and agrees that in case of a breach of any conditions of this bond, the United States District Court for the District of Arizona may upon notice to said surety of not less than ten (10) days proceed summarily in this cause to ascertain the amount of taxable costs in the Circuit Court of Appeals which said surety is bound to pay on account of such

breach, and render judgment therefore against said surety and to order execution therefor.

MRS. DENZEL RIDER

Principal [18]

UNITED STATES FIDELITY
AND GUARANTY COMPANY

a Maryland corporation

[Seal]

O. D. BUCK

Attorney-in-Fact

E. H. SHUMWAY

Attorney-in-Fact

County of Maricopa,
State of Arizona—ss.

On this 23 day of December, in the year *on* thousand nine hundred and Forty-two beffore, E. H. Shumway, a Notary Public in and for said County and State residing herein, duly commissioned and sworn, personally appeared O. D. Buck known to me to be the Attorney-in-Fact of the United States Fidelity and Guaranty Company, a Maryland corporation, and acknowledged to me that he subscribed the name United States Fidelity and Guaranty Company, a Maryland corporation, thereto as principal, and his name as Attorney-in-Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal]

E. H. SHUMWAY

Notary Public in and for Maricopa County, State of
Arizona.

My commission Expires October 1st, 1946.

Approved this 26 day of December, 1942.

DAVE W. LING

U. S. Dist. Judge.

[Endorsed]: Filed December ----, 1942. [19]

United States of America

District of Arizona

Before me, F. A. Hickernell, U. S. Commissioner for the District of Arizona, appeared E. H. Shumway, known to me to be the attorney in fact for United States Fidelity and Guaranty Company and acknowledged to me that he subscribed the name of said company to the within bond as principal and his name as attorney in fact.

Witness my hand and seal this 26th day of December, 1942.

[Seal]

F. A. HICKERNELL

U. S. Commissioner.

[Endorsed]: Filed Dec. 26, 1942. [20]

In the United States District Court
For the District of Arizona

October 1942 Term

At Phoenix

MINUTE ENTRY TUESDAY, JANUARY 6, 1943

(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

On motion of George T. Wilson, Esquire, counsel for the defendant,

It Is Ordered that the defendant's time to prepare, serve and file Bill of Exceptions herein be extended thirty days from and after this date. [21]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Denzel Rider, the defendant-appellant in the above entitled and numbered cause, in connection with her appeal herein, comes now and makes it known that, in the records, proceedings, verdict, judgment, and sentence appealed from, manifest error has intervened to her prejudice, in these things, to wit:

I.

The Court erred in sustaining the plaintiff's objection to the introduction into evidence of defend-

ant's Exhibit "A for Identification", which exhibit is in full as follows:

Phoenix, Arizona,
January 28, 1939

United States Atty. General
Washington, D. C.

I have letter from United States Atty. Gen. office stating they would handle direct from their office the Harriet McManus and Jacob Morgan case. Last Sat. I asked my atty. to reset the Rider v. Funk case which involves diamonds. My main witness Charlie J. Asche was shot. I asked the County Atty. to get me a book that Asche showed me on Sat. night where he saw Morgan with Nicodemus the day before the mail train robbery on Sept. 6. They got the books and are trying to pin the murder on Mrs. Asche. She didn't even know I had the case reset. This case would uncover who stole the Morris Plan diamonds in Tucson on January 28, 1936. I want help.

DENZEL RIDER

P. O. Box 1126 [22]

for the reason that said exhibit and the contents thereof were material, competent, and relevant evidence on the issue of defendant's intent to defraud the United States, as charged in each count of the indictment.

II.

The Court erred in sustaining the plaintiff's objection to the introduction into evidence of defend-

ant's Exhibit "B for Identification", which exhibit is in full as follows:

Department of Justice
Washington, D. C.

January 31, 1939

13M:MHH:vng

49-O

Mrs. Denzel Rider

P. O. Box 1126

Phoenix, Arizona.

Dear Madam:

The Department acknowledges receipt of your telegram of January 28, 1939, relative to the Harriet McManus and Jacob Morgan case and the case of Rider v. Funk.

The subject matter of your telegram will receive the attention of the Department.

Respectfully,

For the Attorney General

(Signed) BRIEN McMAHON

Assistant Attorney
General

for the reason that said exhibit and the contents thereof were material, competent, and relevant evidence on the issue of defendant's intent to defraud the United States, as charged in each count of the indictment.

III.

The Court erred in sustaining the plaintiff's objection to the question propounded to defendant, to wit: [23]

Will you tell the conversation that you had with George V. Lane at that time?

and to the introduction by defendant of said conversation in the latter part of March or early part of April, 1939, for the reason that said conversation and the statements made therein by George V. Lane to the defendant were material, competent, and relevant evidence on the issue of defendant's intent to defraud the United States Government, as charged in each count of the indictment.

IV.

The Court erred in sustaining the plaintiff's objection to defendant's testimony and evidence, as tendered and set forth in her Offer of Affirmative Proof, defendant's Exhibit "C for Identification", which exhibit is in full as follows:

The defendant now offers to prove affirmatively by her own testimony, by documentary evidence, and to corroborate the same by the testimony of witnesses:

That in March, 1939, and prior thereto, defendant had lost valuable personal property through theft and was then asserting a claim against various citizens of Phoenix; that she had been threatened with bodily harm because of said claim and had on one or more occasions been actually assaulted; that she appealed to local officers and failing to receive their assistance appealed to the Department of Justice of the Federal Government for assistance; that on January 31, 1939, the De-

partment of Justice wrote her promising to look into her case; that thereafter, and in the month of March, 1939, George V. Lane approached defendant and represented himself to be an agent of the Department of Justice of the United States Government sent by that Department from Washington to assist defendant in her efforts to recover her property and to protect her from further personal violence; that George V. Lane on several occasions thereafter took defendant to the Federal Court House in the City of Phoenix, and in the presence of several parties, had her turn over to him all of her records and files pertaining to her said personal property and to a claim which she then asserted against the United States Government to recover on a life insurance policy on the life of her deceased husband, Mr. Rider, in the sum of Ten Thousand (\$10,000) Dollars; that George V. Lane repeated his representations [24] of representing the Department of Justice on several different occasions between the month of March and the 14th day of June, 1939; that on or about the 12th day of June, 1939, George V. Lane told her it would be necessary for her to go through a pretended marriage with him in order that he might live in her house and give her protection against those who had forcibly assaulted her; that she refused on that occasions to enter into such contract; that on the 13th day of June, 1939, George V. Lane showed

her a letter purporting to be from the Department of Justice stating that it would be necessary for her to enter into a pretended marriage with George V. Lane and to otherwise follow his direction or the Department of Justice would withdraw him from her case and render her no further assistance; that she believed the representations so made that it was necessary for her to go through this marriage ceremony, that the marriage would not be a binding one but would be void; that it would in nowise affect her property or any right which she had against the United States Government, or any claim which she had previously asserted against the Government, or might in the future assert against the Government; that she did in that state of mind and under the belief that it was not a valid marriage she was contracting with George V. Lane accompany him to Nogales, Arizona and go through a marriage ceremony with him; that always thereafter she denied publicly having entered into any valid marriage with George V. Lane; she did not assume the name of Lane, and that she and Lane did not reside together as husband and wife.

That subsequent to the 14th day of June, 1939, the said George V. Lane continued his representations to her and to other parties to the effect that he was a Government agent assigned to her case and assisting her to recover her property and to protect her from physical

violence; that she always believed until informed otherwise in the month of March, 1940, that he was a Government agent as represented; that about the months of March and April, 1940, George V. Lane threatened to expose her to the Federal Government for having received a widow's compensation as the unremarried widow of Mr. Rider, a World War Veteran, unless defendant would turn over to him all of her property; this she refused to do. That she did thereafter receive and accept the pension checks mentioned in the indictment of this case from the Federal Government; that she *cahsed* the same and retained the proceeds thereof; that in so doing she firmly believed that she was not lawfully married to George V. Lane and that she had full right to said pension. There is attached hereto certain documents in corroboration of this foregoing offer of proof. That the witnesses who will corroborate said offer of proof are, in part, Ed Echols, Sheriff of Pima County, Arizona; Bert Smith, Special Agent of the Santa Fe Railroad; Rue Kimball of Phoenix, Arizona; Mrs. Ernest Moore of Phoenix, Arizona; Dr. Browne and his wife, of Phoenix, Arizona; Mrs. Horace [25] Steele of Phoenix, Arizona; and Mrs. McGinnis of Phoenix, Arizona.

This offer is made and the proof is intended to disprove any criminal intent on the part of defendant to defraud the United States Gov-

ernment, or anyone else, or to commit any violation of Federal Statutes as charged in the indictment of this case.

for the reason that the statute, under which each count of the indictment is laid, makes the specific intent to defraud the United States an essential element of the crime charged, and the testimony and evidence tendered by said Offer of Affirmative Proof was material, relevant, and competent on that issue.

ROBERT W. WEAVER,
GEO. T. WILSON,

Attorneys for Defendant-Appellant, 707 Title &
Trust Building, Phoenix, Arizona.

Received copy of the within Assignments of Error
this 30th day of January, 1943.

E. R. THURMAN,
Asst. United States Attorney.

[Endorsed]: Filed Jan. 30, 1943. [26]

[Title of District Court and Cause.]

PROPOSED BILL OF EXCEPTIONS

Be It Remembered that the above entitled and numbered cause came on regularly for trial before the District Court of the United States for the District of Arizona, Phoenix Division, the Honorable Dave W. Ling presiding with a jury, commencing at the hour of 10:00 o'clock A.M. on December 3, 1942, and continuing thereafter until

the afternoon of said date, when the cause was submitted to the jury and the jury on the 3rd day of December, 1942, returned their verdict into open court, finding the defendant guilty on counts one, two, three, four, five, and six of the indictment.

At the trial of said cause the plaintiff, United States of America, was represented by the Honorable Frank E. Flynn, United States Attorney for the District of Arizona, and R. E. Thurman, Deputy United States Attorney, and the defendant appeared in person and was represented by her attorneys, Robert R. Weaver and Geo. T. Wilson. Both sides having announced ready for trial, and Louis L. Billar having been duly sworn as shorthand reporter, and the jury having been duly summoned into the jury box and duly sworn to try the cause, the following proceedings were had:

The indictment in said cause was read to the jury and [27] defendant's plea thereto of not guilty was stated, whereupon the United States of America, plaintiff, to sustain the allegations of said indictment, called Dorothy Titcomb as a witness on behalf of plaintiff, and said witness being duly sworn, testified as follows:

Direct Examination

My name is Dorothy Titcomb. I reside in Nogales, Arizona. At this time I am Clerk of the Superior Court, Santa Cruz County. I have been such since March, 1942. From May 8, 1939, until October, 1941, I was Deputy Clerk of the Superior Court of Santa Cruz County. I was such Deputy Clerk

on June 14, 1939. At that time Helen O'Keefe was the Clerk of the Superior Court of Santa Cruz County, Arizona, and Judge Gordon Farley was the Judge. He was such Judge on or about June 14, 1939. I am the custodian of the records of the Superior Court of Santa Cruz County and of the application for marriages. I have with me the original application for the issuance of a marriage license to George V. Lane and Denzel Morgan. The signature in the lower right hand corner of the application is my signature. At that time I was the Deputy Clerk of the Superior Court of Santa Cruz County.

The plaintiff offered said document in evidence, to which offer defendant duly objected on the grounds that said document was not shown to be relevant or material to the issues. The objection of defendant was overruled by the Court, to which ruling the defendant then and there duly excepted. Said document was then received in evidence, marked plaintiff's Exhibit No. 1, and is, in substance: [28]

Government's Exhibit No. 1

The original application for a marriage license, dated June 14, 1939, and signed and sworn to by George V. Lane and Denzel Morgan and recorded in the Office of the Clerk of the Superior Court in Santa Cruz County, Arizona, in Book 13 of Applications at page 396 thereof.

The witness Dorothy Titeomb then further testified: The woman applying for the marriage license wrote the signature Denzel Morgan on Government's Exhibit No. 1. I saw the woman who applied for the marriage license sign the name Denzel Morgan at the time she applied for the license in the Clerk's Office in Nogales. That is the lady who sits there with her attorney, Mr. Wilson. There was a marriage license issued subsequent to the application for a marriage certificate. I have a certified copy of it. My name appears on the back of it.

The plaintiff then offered said document in evidence, to which offer the defendant duly objected on the grounds that the document was a copy of an original and that the proper foundation for the reception of secondary evidence had not been laid. The Court overruled defendant's objection, to which ruling defendant then and there duly excepted. Said document was then received in evidence, marked Government's Exhibit No. 2, and is, in substance:

Government's Exhibit No. 2

A certified copy of a marriage license issued by the Clerk of the Superior Court of Santa Cruz County, Arizona, showing rites of matrimony between George V. Lane and Denzel Morgan on June 14, 1939, performed by Gordon Farley, Judge of said Court.

The witness further testified: At the time the application for the marriage license was signed by the defendant, I had a conversation with her. Only

the man with her was present [29] at the conversation. I don't remember the exact time of day; it was around 3:30 or 4:00 o'clock in the afternoon, and I do not remember anyone else in the office at the time. I can relate the conversation I had with the defendant at the time the application was signed. After I had issued the marriage license the defendant, who had done most of the talking up to that time, asked that I not publish it because she was—they were going to wait until they got into a new home, as far as I remember the conversation, before they would announce their marriage, and so she asked that I not publish it and I marked it to be what we called "buried", in other words, not give it to the newspaper. She also at that time asked me if the Superior Court Judge was in, that she wanted him to marry her.

Cross-Examination

During the year 1939 I was issuing 20 and 30 marriage licenses a month. I distinctly remember the issuance of this one. There was no controversy between the gentleman and the lady; the man didn't say anything. There was no controversy between the defendant and me. To the best of my recollection the reason she didn't want it published she wanted to get into her home before she notified her friends she was married. That is the best of my recollection concerning the statements made at that time. It isn't possible that she could have questioned the effect of that marriage upon any property right she might have had. I would have re-

membered it if she had. The only talking the gentleman did was in answer to questions I asked him. I did not hear him make any statement to the defendant. I turned my back and went to type the marriage license, but as far as I heard he didn't make any statements outside of the questions I [30] asked him. There was no time I was out of the room. It might have been that there was a time when I was issuing the marriage license that I did not hear the conversation between them.

Re-direct Examination

I think this was the 9th marriage license I had issued since I had been in the office. It was the second marriage license I had buried, not published. It was the second marriage license I had been instructed not to publish, and it was the first marriage of a person my own age. That is one reason it stands out. That is what impressed it upon my mind according to my remembrance. There is no doubt in my mind that this defendant is the woman that signed that application.

Re-cross Examination

Since the issuance of this license I have been asked frequently not to publish marriage licenses, but this was the second one from the time I had taken office on the 8th of May to the 14th of June; this is only the second I had been asked to bury. Two out of the nine asked me not to publish the license. There were no others that asked me not to publish.

GORDON FARLEY

was then called as a witness on behalf of plaintiff and, being duly sworn, testified as follows:

Direct Examination

My name is Gordon Farley. I occupied the official position of Judge of the Superior Court in Santa Cruz County, Arizona. I have been such Judge since January 1, 1939. I was such Judge on or about the 14th day of June, 1939, and I still am. I know who wrote the signature on the paper which you just [31] handed me. It was the lady seated at the second table, the defendant in this case.

The plaintiff then offered said paper in evidence, to which offer the defendant duly objected on the grounds that there was no relevance shown to the issues, and that it was not material to the issues and not competent evidence. The Court overruled the defendant's objection, to which ruling the defendant then and there duly excepted. The paper was then received in evidence, marked Government's Exhibit No. 3, and is, in substance:

Government's Exhibit No. 3

A sheet of paper bearing only the signature of Denzel Rider Morgan.

The witness then further testified: The situation under which this signature was written on Government's Exhibit No. 3 was that "The defendant came to Nogales last month and appeared in the Clerk's Office and I went over there, I was on busi-

ness in connection with the Court, and the Clerk informed me that this was Mrs. Rider who had come down to Nogales for a copy of the marriage certificate. She was accompanied by a gentleman, and she asked me if I had ever seen her before. I think I told her I didn't remember ever having seen her. Then she talked a little while and I said did you ever write me a letter in connection with a marriage license recently? She said she had not, so then I requested her to sign her name on this slip of paper so that I might compare it to a signature affixed to the letter that I had received from this woman who had been married by me in '39. So Mrs. Rider, or Mrs. Lane, the defendant in this case, signed the name Denzel Rider and at my request added the name Morgan to this slip of paper." [32]

I remember performing a marriage between George V. Lane and Denzel Morgan. There was something said between the defendant and me when she was down in Nogales recently with respect to this marriage. We discussed the marriage and at that time she stated that she had not been married in Nogales and I told her I could not identify her at that time, it had been several years and I had married quite a number of people in the meantime. I have no recollection of just who the people were but I remember the marriage. I have a faint recollection of the Clerk coming over to my office and telling me that there was a couple that wanted to be married, and I recall that the woman appeared

to be several years older than the age given on the marriage license. The man was rather a young appearing man and I would say he was probably forty—somewhere between forty and fifty, but the woman's age was listed as thirty-nine on the marriage license and it occurred to me at the time that I thought she was several years older than that. We discussed that, the defendant and I, in our conversation in the Clerk's Office when she was in Nogales last month. She commented on that fact, and I said well, I distinctly remember that the couple I married the woman was considerably older in my opinion than appeared on the marriage license. I have the letter that was sent to me. It is signed by Denzel Rider. This is the letter and the yellow sheet attached to it is my reply. This letter is in the same condition it was when I received it in the mail. The signature on the letter is the same that the letter bore when I received it in the mail.

The plaintiff then offered said letter, to which was attached said yellow sheet, in evidence for the purpose only of showing the defendant's admissions with respect to the marriage, [33] to which offer the defendant duly objected on the grounds that it was not shown that the defendant wrote this letter and that the letter had not been duly qualified to be received in evidence. The Court overruled defendant's objection, to which ruling defendant then and there duly excepted. Said letter, together with said yellow sheet attached thereto, was then received in evidence, marked Government's Exhibit No. 4, and is, in substance :

Government's Exhibit No. 4

An original typewritten letter dated March 4, 1940, addressed to the Hon. Gordon Farley, Nogales, Arizona, and signed Denzel Rider, P.O. Box 1126, Phoenix, Arizona, and the answer thereto dated March 5, 1940, addressed to Mrs. Denzel Rider, P.O. Box 1126, Phoenix, Arizona.

The witness then further testified: I mailed my answer to the address of the defendant at that time. I put postage on it. My answer was never returned to me.

Plaintiff's Exhibit No. 4 in evidence was then read in part to the jury.

Cross-Examination

I have no recollection as to what either the man or the woman I married on June 14, 1939, looked like, except that the woman was older in my opinion than appeared on the marriage license. I can't identify the defendant as the woman I married on that occasion; I don't know whether she is the woman or not, and I so stated to her a couple of weeks ago.

J. P. GROSS

was then called as a witness on behalf of plaintiff and, being duly sworn, testified as follows:

Direct Examination

My name is J. P. Gross. I live in Tucson. I am an [34] attorney for the Veterans Administration. The Veterans Administration is a department of

the Government of the United States of America. I have been such attorney for the Veterans Administration almost twenty years. As attorney for the Veterans Administration my duties with respect to the investigating and preparing and interviewing with respect to awards made to widows of deceased veterans is that I represent the Administrator of veterans' affairs with respect to all claims within this jurisdiction, embracing not only active, live cases; that is, where veterans are still living, but with respect to veterans deceased and their dependents are paid. We handle all its cases. I know of my own knowledge the necessary steps a widow of a deceased veteran would take in obtaining an award. Before I came to Arizona I was in Washington and handled all types of cases, and it is based on a claim No. 526, which is an affidavit and an application made by the claimant based on the military service of some man bearing a "C" number or claim number. This was all identified with one file. They are passed upon by a group of examiners and awards officers. They usually request evidence in support of the claims, such as marriage——

To this evidence defendant duly objected on the grounds that the witness was not qualified to testify on matters given in his testimony, and that the regulations of the department are the best evidence in the matter of settlement and payment of claims. The Court overruled defendant's objection, to which ruling the defendant then and there duly excepted.

The witness was then permitted to testify, and did testify:

In connection with every application Form 526 by [35] beneficiary they require evidence of a relation, and that is usually in the form of a marriage certificate to support it, and if the evidence appears to be in order an award is made and notice of that award is given the beneficiary. I have the original application for an award. I have in my files, the original application for an award due on account of the death of a veteran signed by one Denzel Lane Rider, the unmarried widow of Arthur C. Rider.

Thereupon the witness produced a document and testified: This is the original Form 526, July 24, 1922. It has been in my care and custody as attorney for the Veterans Bureau. It is an original document and is now in the same form as when I first received it. The signature on the back of it has been there at all times.

On voir dire the witness testified: I am the custodian of this document by the delegation of the Administrator. I am designated under Section 5 for all cases within the Arizona jurisdiction. This document was never filed with me originally. I obtained it from Washington, D. C. The office at Washintgon, D. C. has delegated me as the proper custodian of the instrument.

The plaintiff offered the document in evidence, to which offer the defendant duly objected on the grounds that the witness had not been qualified. The

Court overruled defendant's objection, to which ruling the defendant duly excepted. The document was then received in evidence, marked Government's Exhibit No. 5, and is, in substance:

Government's Exhibit No. 5

An application signed by Denzel Rider for compensation on account of the death of World War Veteran Arthur C. Rider for herself and her minor son, Vaughn D. Rider, [36] as the widow and son respectively of said veteran, dated July 24, 1922, and signed and sworn to by Denzel Rider.

The witness then testified: Subsequent to the presentation of this application the department granted an award. I have the original copy of the award.

The witness then produced a document and testified: This is the award. It is in the usual customary form sent to a widow when an award has been allowed by the department.

The plaintiff then offered said document in evidence, to which offer the defendant then and there objected on the grounds that the witness was not qualified as the proper custodian of the document. The Court overruled defendant's objection, to which ruling the defendant then and there duly excepted. The document was received in evidence, marked plaintiff's Exhibit No. 6, and is, in substance:

Government's Exhibit No. 6

Award of compensation by the United States

Government to Denzel Rider of \$35.00 per month commencing July 15, 1922, in accordance with the Act of Congress of October 6, 1917. The compensation payable under the award was granted on account of the death of World War Veteran Arthur C. Rider and is for the benefit of his widow and child.

The witness then testified: An award is paid on the United States Treasury check by the disbursing officer of the Veterans Administration.

To this evidence the defendant then and there duly objected and moved that it be stricken on the grounds that the witness had not been qualified to testify how the award was made and the manner of the payment. The Court overruled defendant's objection, to which ruling defendant duly excepted.

The plaintiff then offered in evidence six certified [37] copies of checks. The defendant duly objected to said offer on the grounds that the witness was not qualified as, or shown to be, the proper custodian of the documents. The Court overruled defendant's objection, to which ruling the defendant duly excepted. The six checks were then received in evidence, marked Government's Exhibit No. 7, and are, in substance:

Government's Exhibit No. 7

Certified copies of six checks dated respectively June, July, August, September, October and November, 1940, drawn on the Treasurer of the United States, issued by the Division of

Disbursements for Veterans Administration and payable to the order of Mrs. Denzel Rider as the unremarried widow of Arthur C. Rider (four checks for \$30.00 each and two for \$38.00 each), and endorsed on the back Mrs. Denzel Rider as unremarried widow of Arthur C. Rider, P. O. Box 1126, Phoenix, Arizona, which checks were marked paid by the bank.

The witness then testified: When an award has been allowed it is designated by number and identified by numbers assigned to each individual payee's case, and those are borne out not only on the claim itself, on the award itself, but also on the checks issued by the United States Treasurer. No two awards would have the same number. On Government's Exhibit No. 6 in evidence I find the award number in this particular matter is C-824,832. An "X" before the number would mean that the party was then deceased. That same number XC-824,832, appears on the face of the checks at the right hand corner of the payee's name.

The witness was then handed a piece of paper and testified: This paper is a part of my records filed in this case now before the Court. The signature on the paper is that of Mrs. Denzel Rider.

Thereupon the plaintiff then offered the paper in [38] evidence.

On voir dire the witness testified: I did not see Mrs. Denzel Rider write this signature.

The defendant then objected to said offer on the grounds that the letter had not been qualified as a

letter written by this defendant. The Court overruled defendant's objection, to which ruling the defendant duly excepted. The letter was then received in evidence, marked Government's Exhibit No. 8, and is, in substance:

Government's Exhibit No. 8

An original letter dated at Albuquerque, New Mexico, September 21, 1929, addressed to the Veterans Bureau, giving notice of change of address of Mrs. Denzel Rider and signed Mrs. Denzel Rider.

The number XC-824832 which appears in Government's Exhibit No. 8 in evidence corresponds with the number on the checks and in the award. Referring to Exhibit No. 6 in evidence, which was an award of compensation, the department notifies the recipient of an award by sending them a letter notifying them that the award on the application previously filed has been granted, and telling them the condition under which the award was made and under which it was continued. All the department would have would be a copy of that notice of award. The original would be sent to the party who was the recipient and in this case would be the widow.

Thereupon Government's Exhibit No. 1 was read to the jury. Government's Exhibits No. 3 and 5 were then read to the jury. Government's Exhibit No. 7 and 8 were read to the jury.

Cross Examination

I did not testify on direct examination that I had

made an investigation in this case, but I did make an investigation. [39]

The foregoing was all the evidence submitted by plaintiff and the plaintiff rested.

Thereupon, the defendant entered upon the presentation of evidence in support of her plea of "not guilty" to each count of the indictment.

DENZEL RIDER

was then called as a witness in her own behalf, and, being duly sworn, testified:

Direct Examination

My name is Denzel Rider and I am the defendant in this cause. I was born and reared in the State of Indiana. I am forty-seven years of age. I was forty-seven the 12th of September. I was married to Arthur C. Rider, a World War Veteran in Anderson, Indiana, on the 3rd day of April, 1920. One child, Vaughn Rider, was born as a result of that marriage on February 20, 1921. He is not now residing with me; he is in the Army. I have a telegram he is on his way here. Arthur C. Rider died on July 14, 1922, and since then I have been awarded a Government pension of approximately Thirty (\$30.00) Dollars by the Federal Government as the widow of Arthur C. Rider, a veteran of the World War. Since then I have collected the pension. I received a notice from the Veterans Claims Bureau on December—the letter was written on December 4, 1940, and I received it about the 8th of December, 1940, and since then I

have not received the widow's pension; it has been denied me. I have resided in the City of Phoenix, Arizona, since October, 1931. For the past several years I have been engaged in the parking lot business, parking automobiles and selling gasoline. I do the work personally. My place of business is located at Second Street and Monroe. I started in the parking lot business in October of 1937. I first met the man known as George V. Lane [40] the latter part of March or the first of April, 1939. It was about six weeks after I had wired the Attorney General's office for help. Prior to that day I had difficulty concerning my personal property and at that time I was asserting a claim against people for the theft of my property.

Mr. Wilson: And at that time and prior thereto, had you been assaulted physically by any parties of the City of Phoenix because of this claim?

Mr. Thurman: I object to that as immaterial, incompetent and irrelevant.

The Court: What does that have to do with this?

Mr. Wilson: Your Honor, I might say our whole defense goes to the question of criminal intent. The Statute provides that the Government must show that this was done to defraud the United States Government; and I propose to show by this witness the claim that she had made because of this property, the appeal to the authorities, and the advent of George V. Lane representing himself to be with the Department of Justice, and to show

what has happened from that time up to the present moment.

The Court: Well, I will sustain the objection then.

Mr. Wilson: An exception, please, to the ruling of the Court.

Mr. Wilson: Had you, prior to the time you met George V. Lane applied to the Department of Justice of the United States for assistance in your behalf?

The Witness: Yes.

Mr. Thurman: I object to that on the same grounds that I objected to before.

The Court: The same ruling. [41]

Mr. Wilson: And let me ask you, Mrs. Rider, showing you a telegram, is this the telegram you sent to the Department of Justice in the latter part of January, 1939?

Mr. Thurman: I object to the question, immaterial, and incompetent.

The Witness: Yes. This is the telegram I wired. It is a copy of the telegram.

Mr. Wilson: And showing you this letter, is that the letter that you received from the Department of Justice in answer to your telegram?

The Witness: Yes, sir.

Mr. Wilson: We offer this telegram in evidence, if the Court pleases, at this time.

Mr. Thurman: We object to that, Your Honor, as being incompetent, immaterial and irrelevant. And we make a further objection, Your Honor, that it is self-serving also.

The Court: I don't see what it would have to do with the case. I don't see any connection with the matter charged in this indictment.

Mr. Wilson: Except that it will touch upon the question of criminal intent of the accused in doing the things set out in the indictment, the things which she is charged with doing that constituted the crime.

The Court: The objection will be sustained.

Mr. Wilson: And may we have an exception to the ruling of the Court, and may these be marked for identification in the case?

The Clerk: The telegram will be defendant's Exhibit A for identification; the letter is Defendant's Exhibit B for identification. [42]

The telegram was then marked Defendant's Exhibit A for identification, and the letter was marked Defendant's Exhibit B for identification, and said documents are in full as follows:

Defendant's Exhibit A
for Identification

Phoenix, Arizona, January 28, 1939
United States Atty. General
Washington, D. C.

I have letter from United States Atty. Gen. office stating they would handle direct from their office the Harriet McManus and Jacob Morgan case. Last Sat. I asked my atty. to reset the Rider v. Funk case which involves diamonds. My main witness Charlie J. Ashe was shot. I asked the County Atty. to get me a

book that Asche showed me on Sat. night where he saw Morgan with Nicodemus the day before the mail train robbery on Sept. 6. They got the books and are trying to pin the murder on Mrs. Asche. She didn't even know I had the case reset. This case would uncover who stole the Morris Plan diamonds in Tucson on January 28, 1936. I want help.

DENZEL RIDER

P. O. Box 1126

Defendant's Exhibit B
for Identification

Department of Justice
Washington, D. C.

January 31, 1939

13M:MHH:vng

49-O

Mrs. Denzel Rider

P. O. Box 1126

Phoenix, Arizona

Dear Madam:

The Department acknowledges receipt of your telegram of January 28, 1939, relative to the Harriet McManus and Jacob Morgan case and the case of Rider v. Funk. [43]

The subject matter of your telegram will receive the attention of the Department.

Respectfully,

For the Attorney General

(Signed) BRIEN McMAHON

Assistant Attorney General

The Witness: I met George V. Lane in March or April, 1939. He came to my parking lot on Second Street and Monroe about 2:00 o'clock in the afternoon. He was alone at the time. He was carrying a brief case.

Mr. Wilson: Will you tell the conversation you had with George V. Lane at that time?

Mr. Thurman: I think that is highly objectional about relating this conversation with this man Lane at that time. There is a marriage which has been proved here in this Courtroom, and it is self-serving.

The Court: What was the date of this visit, before or after the alleged——

Mr. Wilson: This was in the latter part of March or early part of April, 1939.

The Court: It is rather hard to tell whether it would be material or not. Well, I will sustain the objection.

Mr. Wilson: May there be an exception to the ruling of the Court. May I have a conference with counsel and with Your Honor just to shorten this matter and to show to the Court what we——

(A discussion was had at the bench between Court and counsel not audible to the jury.)

Mr. Wilson: We now make a formal tender of proof in this case, and the proof all goes to the question solely of the intent of the accused at the time she performed the acts charged [44] against her in the indictment and which it is claimed con-

stituted a crime. To that we will attach the documents which will corroborate it.

The Court: Have you read this?

Mr. Thurman: I have not. I want to object to the offer of proof of the defendant in this case, for the reason it is self-serving, incompetent, irrelevant and immaterial, and there is no basis for defense in this action.

The Court: I think that is true; self-serving.

Mr. Wilson: And the ruling of the Court is sustaining the objection?

The Court: Yes.

Mr. Wilson: At this time, if the Court please, the defendant respectfully excepts to the ruling of the Court denying our right to substantiate our offer of proof, and may we have the privilege of having our offer of proof with the documents supporting it made exhibits in this case?

The Court: Yes.

The document entitled Offer of Affirmative Proof by the Defendant in the Above Entitled and Numbered Cause was received and marked as Defendant's Exhibit C for identification. Said exhibit, omitting the title of the Court and caption, is in full as follows:

Defendant's Exhibit C
for Identification

Offer of Affirmative Proof by the Defendant
in the Above Entitled and Numbered Cause

The defendant now offers to prove affirma-

tively by her own testimony, by documentary evidence, and to corroborate the same by the testimony of witnesses:

That in March, 1939, and prior thereto, defendant had lost valuable personal property through theft and was [45] then asserting a claim against various citizens of Phoenix; that she had been threatened with bodily harm because of said claim and had on one or more occasions been actually assaulted; that she appealed to local officers and failing to receive their assistance appealed to the Department of Justice of the Federal Government for assistance; that on January 31, 1939, the Department of Justice wrote her promising to look into her case; that thereafter, and in the month of March, 1939, George V. Lane approached defendant and represented himself to be an agent of the Department of Justice of the United States Government sent by that Department from Washington to assist defendant in her efforts to recover her property and to protect her from further personal violence; that George V. Lane on several occasions thereafter took defendant to the Federal Court House in the City of Phoenix, and in the presence of several parties, had her turn over to him all of her records and files pertaining to her said personal property and to a claim which she then asserted against the United States Government to recover on a life insurance policy on the life of her deceased hus-

band, Mr. Rider, in the sum of Ten Thousand (\$10,000) Dollars; that George V. Lane repeated his representations of representing the Department of Justice on several different occasions between the month of March and the 14th day of June, 1939; that on or about the 12th day of June, 1939, George V. Lane told her it would be necessary for her to go through a pretended marriage with him in order that he might live in her house and give her protection against those who had forcibly assaulted her; that she refused on that occasion to enter into such contract; that on the 13th day of June, 1939, George V. Lane showed her a letter purporting to be from the Department of Justice stating that it would be necessary for her to enter into a pretended marriage with George V. Lane and to otherwise follow his direction or the Department of Justice would withdraw him from her case and render her no further assistance; that she believed the representations so made that it was necessary for her to go through this marriage ceremony, that the marriage would not be a binding one but would be void, that it would in nowise affect her property or any right which she had against the United States Government, or any claim which she had previously asserted against the Government, or might in the future assert against the Government; that she did in that state of mind and under the belief that it was not a valid marriage she was contracting with

George V. Lane accompany him to Nogales, Arizona and go through a marriage ceremony with him; that always thereafter she denied publicly having entered into any valid marriage with George V. Lane; she did not assume the name of Lane, and that she and Lane did not reside together as husband and wife.

That subsequent to the 14th day of June, 1939, the said George V. Lane continued his representations to her and to other parties to the effect that he was a [46] Government agent assigned to her case and assisting her to recover her property and to protect her from physical violence; that she always believed until informed otherwise in the month of March, 1940, that he was a Government agent as represented; that about the months of March and April, 1940, George V. Lane threatened to expose her to the Federal Government for having received a widow's compensation as the unremarried widow of Mr. Rider, a World War Veteran, unless defendant would turn over to him all of her property; this she refused to do. That she did thereafter receive and accept the pension checks mentioned in the indictment of this cause from the Federal Government; that she cashed the same and retained the proceeds thereof; that in so doing she firmly believed that she was not lawfully married to George V. Lane and that she had full right to said pension. There is attached hereto certain documents in corroboration of

this foregoing offer of proof. That the witnesses who will corroborate said offer of proof are, in part, Ed Echols, Sheriff of Pima County, Arizona; Bert Smith, Special agent of the Sante Fe Railroad; Rue Kimball of Phoenix, Arizona; Mrs. Ernest Moore of Phoenix, Arizona; Dr. Browne and his wife, of Phoenix, Arizona; Mrs. Horace Steele of Phoenix, Arizona; and Mrs. McGinnis of Phoenix, Arizona.

This offer is made and the proof is intended to disprove any criminal intent on the part of defendant to defraud the United States Government, or anyone else, or to commit any violation of Federal Statutes as charged in the indictment of this case.

ROBERT WEAVER

GEO. T. WILSON

Attorneys for Defendant

707 Title & Trust Bldg.

Phoenix, Arizona

The plaintiff then waived cross-examination of the witness. The defendant offered no further evidence and rested. The plaintiff offered no rebuttal evidence and rested.

The defendant then moved for an order directing the jury to return a verdict of not guilty on each count of the indictment on the grounds that the evidence offered by the Government was not sufficient to prove the allegations of the indictment, or the commission of any crime by the defendant,

beyond a reasonable doubt, that there was a failure of proof showing that defendant ever contracted marriage with any man, [47] or showing that, when she endorsed the checks she was not the unremarried widow of Arthur C. Rider.

Defendant's motion was denied, to which ruling the defendant duly excepted.

The cause was then argued to the jury; the jury was then instructed on the law and retired to consider its verdict.

The defendant presents the foregoing as her Proposed Bill of Exceptions in the above entitled and numbered cause and prays that same may be settled and allowed.

Dated this 30th day of January, 1943.

ROBERT R. WEAVER

GEO. T. WILSON

Attorneys for Defendant

707 Title & Trust Bldg.

Phoenix, Arizona

The foregoing Bill of Exceptions is correct and may be settled and allowed by the Court.

Dated this 2nd day of February, 1943.

F. E. FLYNN

E. R. THURMAN

United States Attorney

The foregoing Bill of Exceptions is correct and is hereby settled, allowed and approved.

Dated this 2 day of February, 1943.

DAVE W. LING

Judge of the District Court
of the United States for the
District of Arizona. [48]

Received copy of proposed bill of exceptions this
1-30-43.

E. R. THURMAN

Asst. U. S. Attorney

[Endorsed]: Deft's Proposed Bill of Exceptions
Filed Jan. 30, 1943. Edward W. Scruggs, Clerk,
United States District Court for the District of
Arizona. By Gwen. Roby, Deputy Clerk.

[Endorsed]: Bill of Exceptions Filed Feb. 2,
1943. Edward W. Scruggs, Clerk, United States
District Court for the District of Arizona. By
Gwen. Roby, Deputy Clerk. [49]

In the United States District Court
for the District of Arizona

October 1942 Term

At Phoenix

MINUTE ENTRY OF TUESDAY,
FEBRUARY 2, 1943

(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, presiding.

[Title of Cause.]

E. R. Thurman, Esquire, Assistant United States Attorney, appears for the Government. George Wilson, Esquire, appears as counsel for the defendant. Said counsel now stipulate that defendant's Proposed Bill of Exceptions may be amended by interlineation by adding the words "which checks were marked paid by the bank" following the word "Arizona" in line 16 of page 12 thereof, and that the same may thereafter be settled and allowed by the Court, and

It Is Ordered that said Proposed Bill of Exceptions, as so amended, be settled, allowed and approved as the Bill of Exceptions in this case.

[50]

[Title of District Court and Cause.]

ORDER TRANSMITTING ORIGINAL
EXHIBITS IN LIEU OF COPIES.

On motion of the defendant-appellant:

It Is Ordered that the Clerk of this Court transmit to the United States Circuit Court of Appeals for the Ninth Circuit, with the certified transcript of record, the original exhibits introduced into evidence on the trial of this cause, including the original reporter's transcript of evidence, in lieu of copies thereof.

Dated this 2nd day of February, 1943.

DAVE W. LING

Judge of the District Court
of the United States, for the
District of Arizona.

[Endorsed]: Filed Feb. 2, 1943. [51]

In the United States District Court
for the District of Arizona

October 1942 Term

At Phoenix

MINUTE ENTRY OF FEBRUARY 11, 1943
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, presiding.

[Title of Cause.]

On motion of George T. Wilson, Esquire, counsel
for the defendant.

It Is Ordered that the Clerk of this Court trans-
mit to the United States Circuit Court of Appeals
for the Ninth Circuit, with the transcript of record
herein, Defendant's exhibits A, B and C marked for
identification at the trial of this case. [52]

[Title of District Court and Cause.]

PRAECIPE OF DEFENDANT FOR
RECORD ON APPEAL

To the Clerk of the District Court of the United
States for the District of Arizona:

The defendant-appellant, Denzel Rider, hereby requests that you make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to her appeal taken in the above entitled cause, and to include in such transcript of record the following:

1. Indictment.
2. Verdict of Jury.
3. Judgment and Sentence entered December 7, 1942.
4. Notice of Appeal.
5. Bond on Appeal.
6. Bill of Exceptions.
7. Assignment of Errors.
8. Order Directing Transmittal of Original Exhibits of February 2, 1943.
9. The following minute entries:
Minute Entry of July 31, 1942,
December 3, 1942,
December 12, 1942,
January 6, 1943,
February 2, 1943. [53]
10. This Praecipe.

Dated at Phoenix, Arizona this 2nd day of February, 1943.

ROBERT R. WEAVER

GEO. T. WILSON

Attorneys for Defendant-
Appellant,

Received copy of the within Praecipe this 2nd day of February, 1943.

F. E. FLYNN (G)

United States Attorney.

[Endorsed]: Filed Feb. 2, 1943. [54]

In the United States District Court
For the District of Arizona

CLERK'S CERTIFICATE TO
TRANSCRIPT OF RECORD

United States of America,
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of said Court, including the records, papers and files in the case of United States of America, plaintiff, vs. Denzel Lane, alias Denzel Rider, alias Denzel Morgan, defendant, numbered C-6276 Phoenix, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 54, inclusive, contain a full, true and correct transcript of the proceedings had in said cause,

and of all the papers filed therein, together with the endorsements of filing thereon, called for and designated in Defendant's Praecipe for Record on Appeal filed therein and made a part of the transcript attached hereto, as the same appear from the originals of record remaining on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the original reporter's transcript, and all original exhibits introduced in evidence at the trial of said cause, to-wit: Government's exhibits 1 to 8, inclusive; and Defendant's exhibits A, B and C, marked for identification at the trial of said cause, are transmitted herewith pursuant to orders of the Court.

I further certify that the Clerk's fee for preparing and certifying this said transcript of record amounts to the sum of \$10.40 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 11th day of February, 1943.

[Seal]

EDWARD W. SCRUGGS,

Clerk

By WM. H. LOVELESS,

Chief Deputy Clerk [55]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

The above entitled and numbered cause came on duly and regularly for trial in the above-mentioned

court, before Hon. Dave W. Ling, Judge, presiding with a jury, commencing at the hour of 10 o'clock A. M. on the 3d day of December, 1942.

The plaintiff was represented by Frank E. Flynn, United States Attorney and E. R. Thurman, assistant to the United States Attorney.

The defendant was represented by her attorney, George Wilson.

Thereupon the following proceedings were had:

The Court: Call 26 jurors. Will the Government waive two challenges?

Mr. Thurman: Yes, sir.

The Court: Is that agreeable with counsel for the defendant? [1*]

Mr. Wilson: Yes, that is all right, your Honor.

The Court: All right, call the names of all the jurors in the box. As your names are called, come forward, gentlemen.

Thereupon, 26 jurors were called, examined on their voir dire by the court and the attorneys, after which the following jurors were selected and duly sworn:

James M. Kempson; L. R. McPeck; Harry Amster; C. F. Brahm; Ralph C. Barton; Robert L. Boydston; Sydney B. Cooper; Connol H. Frantz; John Gabriel; Melvin C. Jenson; Ray C. Fortenberry and J. Otis Sullivan.

The Court: You may read the indictment.

(The indictment was read to the jury by Mr. Thurman.)

*Page numbering appearing at top of page of original Reporter's Transcript.

The Court: You may call your first witness.

Mr. Thurman: Dorothy Titcomb.

DOROTHY TITCOMB

was called as a witness on behalf of Plaintiff, and being first duly sworn, testified as follows:

Direct Examination [2]

Mr. Thurman:

Q. Will you please state your name?

A. Dorothy Titcomb.

Q. Where do you live?

A. Nogales, Arizona.

Q. And what is your business or occupation?

A. At this time?

Q. Yes.

A. Clerk of the Superior Court, Santa Cruz County.

Q. Santa Cruz County, Arizona?

A. Yes.

Q. How long have you been such Clerk in the Superior Court of Santa Cruz County?

A. Since March of 1942.

Q. Prior to March, 1942, did you have any connection or duty with the Clerk's office of the Superior Court of Santa Cruz County?

A. Yes, from May 8th, 1939, until October, 1941, I was Deputy Clerk of the Superior Court.

Q. From May 8th—

A. (Interrupting) '39.

Q. And on June 14th, 1939, were you such Deputy Clerk? A. Yes, I was.

(Testimony of Dorothy Titcomb.)

Q. And at that time who was the Clerk of the [3] Superior Court? A. Helen O'Keefe.

Q. And who was the Judge of the Superior Court of Santa Cruz County, Arizona?

A. Judge Gordon Farley.

Q. Was he such Judge on or about the 14th of June, 1939? A. Yes, sir.

Q. Now, you are the custodian, are you not, of the records of the Superior Court of Santa Cruz County? A. Yes, I am.

Q. And as to applications for marriage licenses?

A. Yes, I have them.

Q. And do you have with you at this time an application for the issuance of a marriage license to George V. Lane and Denzel Morgan?

A. Yes, I have.

Q. Is it the original?

(The witness hands document to Mr. Thurman.)

Mr. Thurman: Please mark this exhibit for identification.

(The document was marked as Government's Exhibit 1 for Identification.)

Q. Can you tell whose signature this is in [4] the right-hand lower corner of Exhibit 1 for identification? A. It is my signature.

Q. That is your signature "Dorothy Titcomb"?

A. Yes.

Q. And at that time you were the Deputy Clerk of the Superior Court of Santa Cruz County?

(Testimony of Dorothy Titcomb.)

A. Yes, I was.

Mr. Thurman: I offer it.

Mr. Wilson: To which offer, if the court please, we object on the ground there has been shown no application whatever to the issues involved in this case or that it refers to Denzel Rider, the woman now on trial in this case. We object to it on the grounds that it is not shown to be relevant or material to the issues here.

The Court: Well, it may become so. The objection is overruled.

Mr. Wilson: May we have an exception, if the court please?

The Court: Yes.

(The document was received as Government's Exhibit 1 in Evidence.)

Mr. Thurman: I hand you Government's Exhibit 1 in evidence and I will ask you if you know who wrote the signature "Denzel Morgan" on the instrument? [5]

A. It was the woman applying for the marriage license.

Q. And did you see the woman that applied for that marriage license sign that name "Denzel Morgan"?

A. Yes, I have.

Q. Where was that?

A. At the time she got the marriage license, applied for the marriage license in Nogales.

Q. In the Clerk's office?

A. In the Clerk's office.

Q. And is that woman in the court room now?

(Testimony of Dorothy Titcomb.)

A. Yes, she is.

Q. Is that the lady that sits there with her attorney, Mr. Wilson (indicating the defendant)?

Mr. Wilson: We object, if the court please, on the ground the question is leading and suggestive. I believe the witness should be permitted to——

The Court: (Interrupting) You may answer.

(The question was read by the reporter.)

The Witness: Yes, it is.

Mr. Thurman: And subsequent to that—subsequent to the issuance of the affidavit, the application for a marriage certificate, was there a marriage license issued? [6]

A. Yes, there was.

Q. Have you it with you?

A. I haven't the original here with me, I have a copy of it.

Q. What kind of a copy?

A. A certified copy (handing document to Mr. Thurman).

Mr. Thurman: Mark this for identification.

(The document was marked as Government's Exhibit 2 for Identification.)

Mr. Thurman: I hand you Government's Exhibit 2 for identification and ask you whose name appears on the back of it?

A. It is my—the signature is my name, Dorothy Titcomb.

Mr. Thurman: I offer it.

Mr. Wilson: The defendant objects, if the court please, on the ground that it proves to be merely a

(Testimony of Dorothy Titecomb.)

Mr. Wilson: You distinctly remember the issuance of this one? A. Yes, I do.

Q. And you remember, do you not, that there was some controversy between the gentleman in the case and the lady in the case?

A. No, there was not. The man didn't say anything.

Q. The controversy, if any, was between you and the defendant?

A. There was no controversy.

Q. Was there any mention of any property made at all to the best of your recollection by this woman?

A. The best of my recollection was that that was the reason she didn't want it published, so she wanted to get into her home before she notified her friends she was married.

Q. Is that the best of your recollection concerning what statements were made at that time?

A. Yes, it is.

Q. Is it possible that she could have questioned the effect of that marriage upon any property rights she might have had? A. No. [10]

Q. You are very certain of that?

A. I would have remembered that if she had.

Q. Did the gentleman in the case do any talking at all?

A. Only answered the questions I asked him concerning his application.

Q. He made no statement to the defendant?

A. Not that I heard. Now, I turned my back and went to type the marriage license, but as far

(Testimony of Dorothy Titcomb.)

as I heard, he didn't make any statement outside of the questions I asked.

Q. There was, then, a period during the issuance of this license, a period when you were not present with the man and the woman to hear what was said between them?

A. There was no time I was out of the room.

Q. No, but there was a time when you could not hear any conversation between them?

A. Well, when you are issuing a marriage license you don't issue it on their conversation.

Q. Well, I know that, Mrs. Titcomb, that is correct, you didn't hear everything that happened between this man and women at that time, isn't that true? A. That might have been so.

Mr. Wilson: Yes, that is all. [11]

Redirect Examination

Mr. Thurman:

Q. Now, prior to June 14th, 1939, how many marriage licenses or applications did you take?

A. Well, I think this was the ninth marriage license I had issued since I had been in the office. It was the second marriage license I had buried, not published.

Q. The second marriage license where you had been instructed not to publish it?

A. Yes, and it was the first marriage of a person of my own age, so that is one reason it stands out.

Q. That is what impressed it upon your mind?

A. Yes.

(Testimony of Dorothy Titcomb.)

Q. According to your remembrance?

A. Yes, sir.

Q. And there is no doubt in your mind that this defendant is the woman that signed that application?

A. No, sir.

Mr. Wilson: I object as leading.

Recross Examination

Mr. Wilson:

Q. Now, just one other question. Then, I take it from your testimony, Mrs. Titcomb, that [12] frequently you were asked not to publish marriage licenses, is that correct?

A. Since then, yes, Mr. Wilson, but this was the second one from the time I had taken office on the 8th of May to the 14th of June; this is only the second one I had been asked to bury.

Q. It was two out of nine you had been asked not to publish?

A. Yes.

Q. This defendant or this man were not the only parties that had. There were others that you were asked not to publish or issue, were there?

A. No, sir.

Q. Since then you have frequently been asked not to publish marriage licenses?

Mr. Thurman: I object——

Mr. Wilson: Is that right?

Mr. Thurman: It is immaterial, incompetent and irrelevant, your Honor.

The Court: Well, I think so too.

Mr. Wilson: What?

The Court: The objection is sustained.

Mr. Wilson: All right. That is all.

(The witness was excused.)

The Court: We will have a brief recess now, gentlemen, and during the recess you will not [13] discuss the case among yourselves or permit anyone to discuss it with you. Also do not form or express any opinion on the subject.

(A short recess was taken, after which, all parties as noted by the Clerk's record being present, the trial resumed as follows:)

The Court: Call your next witness.

Mr. Thurman: Judge Farley.

Will you mark this piece of paper here for identification?

(The document was marked as Government's Exhibit 3 for Identification.)

GORDON FARLEY

was called as a witness on behalf of plaintiff, and being first duly sworn, testified as follows:

Direct Examination

Mr. Thurman:

Q. Please state your name.

A. Gordon Farley.

Q. And what official position do you hold in Santa Cruz County, Arizona?

A. I am Judge of the Superior Court.

Q. And, Judge, how long have you been Judge of that Superior Court?

A. Since January 1st, 1939. [14]

(Testimony of Gordon Farley.)

Q. And you were such Judge, were you, on or about the 14th day of June, the year 1939?

A. I was.

Q. And you still are? A. Still am.

Q. I hand you Government's Exhibit 3 marked for identification and ask you if you know who wrote that signature on it? A. I do.

Q. Who?

A. The lady seated at the second table.

Q. That is, the defendant in this case?

A. Yes.

Mr. Thurman: I offer it.

Mr. Wilson: May I inquire of counsel, if the court please, for what purpose this is offered, what bearing it has upon the issues involved in this case?

The Court: Well, he probably will let you know in a moment.

Mr. Wilson: Oh, I think we have the right, in order to have a predicate for the proper objection, under the rules of evidence we ought to know.

The Court: All right.

Mr. Wilson: We object to it at this time on [15] the grounds there is no relevancy shown; that it is not material to the issues in any case here and not competent evidence.

Mr. Thurman: I want to offer it for the purpose of comparison, your Honor, of the signature of the defendant in this case. It is true that we have a certified copy of the marriage certificate between Mr. Lane and the defendant, but it is necessary to supplement on that, supplement it—sup-

(Testimony of Gordon Farley.)

plant it with additional evidence, and with our proof it is necessary to show with the other documents we expect to put into evidence with the signature which he put in for the purpose of comparison.

The Court: All right.

Mr. Wilson: May I interpose a further objection, on the grounds that a comparison cannot be made except on those documents which are introduced as a part of the case, and no extraneous signature may be introduced for that purpose.

The Court: It may be received.

Mr. Wilson: To which we respectfully ask an exception.

(The document was received as Government's Exhibit 3 in Evidence.)

Mr. Thurman: With respect to Exhibit 3 in [16] evidence, Judge, under what fact situation was it that this signature was written on this piece of paper here, Exhibit 3?

A. Well, the defendant came to Nogales some time last month and appeared in the Clerk's office and I went over there, I was on business in connection with the court, and the Clerk informed me that this was Mrs. Rider who had come down to Nogales for a copy of the marriage certificate, and she was accompanied by a gentleman and she asked me if I had ever seen her before and I think I told her that I didn't remember ever having seen her. Then she talked a little while and I said, "Did

(Testimony of Gordon Farley.)

you ever write me a letter in connection with a marriage license or a marriage, rather?" She said she had not, so then I requested her to sign her name to this slip of paper so that I might compare it with the signature affixed to the letter that I had received from this woman who had been married by me in '39. So, Mrs. Rider or Mrs. Lane, the defendant in this case, signed the name "Denzel Rider" and at my request, added the name "Morgan" to this slip of paper.

Q. Now, do you remember, Judge, of performing a marriage between George V. Lane and Denzel Morgan? [17] A. Yes.

Q. And was anything said between you and the defendant when she was down in Nogales recently with respect to their marriage?

A. Yes, we discussed the marriage and at that time she stated that she had not been married in Nogales and I told her that I could not identify her at that time, it had been several years and I had married quite a number of people in the meantime. I had no independent recollection of just who the people were, but I remember the marriage.

Q. What do you remember of that marriage, Judge?

A. Well, I have a faint recollection of the Clerk coming over to my office and telling me that there was a couple that wanted to be married and I recall that the woman appeared to be several years

(Testimony of Gordon Farley.)

older than the age given on the marriage license. The man was rather a young-appearing man and I would say he was probably 40—somewhere between 40 and 45, but the woman's age was listed as 39 on the marriage license and it occurred to me at the time that I thought she was several years older than that.

Q. That is the woman that you married at that time? [18]

A. Yes. We discussed that, the defendant and I, in our conversation in the Clerk's office when she was in Nogales last month. She commented on that fact, and I said, "Well, I distinctly remember that the couple I married, the woman was considerably older in my opinion than appeared on the marriage license".

Q. Judge, have you got the letter that was sent to you? A. I have.

Q. Signed by who?

A. It is signed by Denzel Rider.

Mr. Wilson: We object to it, if the court please, on the ground that the letter is the best evidence as to who signed it.

(The witness produces document and hands it to Mr. Thurman.)

The Witness: My reply is attached to that letter.

Mr. Thurman: The yellow sheet?

A. Yes.

Mr. Thurman: Mark the letter and the reply of the Judge for identification.

(Testimony of Gordon Farley.)

(The documents were marked as Government's Exhibit 4 for Identification.)

Mr. Thurman: Judge, is this letter in the [19] same condition it was when you received it in the mail?

A. It is. I believe that it has a red check-mark or two on it that was not on there, and I believe this is the filing mark that my secretary put on it. I am not certain about that.

Q. And about the signature, is that the signature that the letter bore when you received it in the mail?

A. It is the same signature.

Mr. Thurman: We make an offer of this letter, your Honor, for the purpose of only showing her admissions with respect to the marriage, and for no other purpose.

Mr. Wilson: To which we object, if the court please, on the grounds that there is no connection shown between this defendant and the offer of this letter, or that this defendant ever wrote this letter; had anything to do with it or any knowledge of it at all. We object to it on the grounds it is not material; it is not duly qualified to be received in evidence.

The Court: Well, let me see it then I will know more about it.

(The document was handed to the court.)

The Court: It may be received. [20]

(Testimony of Gordon Farley.)

Mr. Wilson: To which ruling the defendant respectfully excepts, if the court please.

(The documents were received as Government's Exhibit 4 in Evidence.)

Mr. Thurman: Now, with respect to your answer, Judge, did you mail that to the address of the defendant?

A. I did.

Q. At that time? A. Yes.

Q. And put postage on it? A. I did.

Q. And did the letter ever come back to you, the original letter?

A. It never did; that is, my original letter.

Q. That is, your answer to this letter?

A. No.

Mr. Thurman: I now ask that the pertinent part of the exhibit be read into the record pertaining to the matter of the marriage at Nogales.

The Court: Yes, there is some that should not be read.

Mr. Flynn: If the court please, I will now read into the record and to the jury the parts of Exhibit 4, Government's Exhibit 4 in evidence. The date is March 4th, 1940, Phoenix, Arizona, [21] Postoffice Box 1126.

(Testimony of Gordon Farley.)

“Honorable Judge Gordon Farley,
Nogales, Arizona.

“Dear Sir:”

Reading from the second paragraph of the first page:

“George V. Lane is in the real estate business here in Phoenix, and I have a auto parking lot which I had two years before I married him.”

On the second page in the first paragraph:

“When I got the loan to remodel the house he promised me that he would do the work, but when the time came I had to pay him \$6.00 a day the loan check will show that Denzel Rider paid George V. Lane a total of \$144.00 for labor, I don't know what he did with it, he said he owe bills that he had accumulated long before we were married. He has never as much as bought one thing for the home and at *know* time has he ever furnished me a place to live, when we were married he just moved his clothes in where I already was living.”

The same paragraph on page 2:

“He (Lane) says now that he is one-half owner because I used this money sence he and I were married.”

(Testimony of Gordon Farley.)

Paragraph 2 of page 2: [22]

“Lane is trying to do the same thing that Morgan did, steal the Rider property. Since I married him under the name of Denzel Morgan which is not my right name, of course I thought when you married me that was my name but sence I see on the records that Morgan filed the decree and gave me back the name of Rider I don't think that I am legally married to Lane.”

The third paragraph, page 2:

“Is it possible to have this done without any *noterity*?”

No, I guess I will have to read a part of the preceding paragraph for the connection here, continuing right from where I left off in the last quotation:

“All Lane wants with me is a meal ticket and the Rider property it is *possibly* to have this marriage annulled, if so I would like to have it done.

“Is it possible to have this done without any *noterity*? The reason I am writing you direct is because we came to you to get married. You married us June 14th, 1939, in your Chambers.”

The last paragraph of the letter on page 3:

“I would appreciate your *advise* at the ear-

(Testimony of Gordon Farley.)

liest *convience* that you have an opportunity to write me. I would appreciate it if this could all [23] be taken care of in Nogales. As *know* one in Phoenix know that I am married. I would not care if it was not for hurting my business here. But Lane would not hesitate just so long as he can get property for nothing.

“Thanking you in advance, yours truly”

and in writing and printing under that,

“Mrs. Denzel Rider, Postoffice Box 1126,
Phoenix, Arizona.”

Mr. Wilson: May I see that letter?

(The document was handed to Mr. Wilson.)

The Court: Is that all for this witness?

Mr. Flynn: Yes.

The Court: You may cross-examine.

Cross Examination

Mr. Wilson:

Q. Judge Farley, as I understand your direct testimony, it is that you cannot identify this defendant as the woman that was married by you to a man on the 14th of June, 1939, in your Chambers at Nogales, is that right?

A. Well, I have no recollection as to what either one of them looked like, except that the woman was older in my opinion than appeared on the marriage license.

Q. The question is, you cannot now identify

(Testimony of Gordon Farley.)

her as the woman in the case, and you so stated to [24] her at that time, did you, a couple of weeks ago?

A. No, that is true, I can't identify her. I don't know whether that is the woman or not.

Q. I believe you did say that you had her write her name? A. Yes.

Q. And that name has been introduced in evidence as Exhibit No. 3?

A. That is correct.

Q. Will you examine the signature on this letter, please, particularly the "D", the starting of the word "Denzel", and will you examine the "D" on this letter which will later be shown to be in the handwriting of George V. Lane and state, in your opinion if they were written by the same hand?

Mr. Thurman: We object to that. That is up to the jury.

The Court: He is not qualified as a handwriting expert.

Mr. Wilson: I see. All right, we will withdraw it; we will withdraw it at this time, if the court please. I think that is all, if the court please.

Mr. Thurman: That is all, Judge, thank you. Now, Judge Farley has to get back to Nogales and [25] with the permission of Mr. Wilson we would like to excuse him.

Mr. Wilson: Yes, that is all right.

The Court: Yes.

Mr. Thurman: Thank you.

(Testimony of Gordon Farley.)

The Witness: Thank you.

(The witness was excused.)

Mr. Thurman: Mr. Gross.

J. P. GROSS

was called as a witness on behalf of plaintiff, and being first duly sworn, testified as follows:

Direct Examination

Mr. Thurman:

Q. Please state your name?

A. J. P. Gross.

Q. Where do you live, Mr. Gross?

A. In Tucson.

Q. And what was your—what is your business or occupation?

A. I am Attorney for the Veterans' Administration.

Q. The what?

A. Attorney for the Veterans' Administration.

Q. And the Veterans' Administration is a department of the Government of the United States [26] of America, is it? A. Yes, sir.

Q. And how long have you been such Attorney for the Veterans' Administration?

A. Almost 20 years.

Q. And what has been your activities as Attorney for the Veterans' Administration over the past 20 years; what sort—

(Testimony of J. P. Gross.)

Mr. Wilson (Interrupting): I object as not material to the issues in the case.

The Court: No, that might cover a lot of—

Mr. Thurman (Interrupting): Well, can you tell the court and jury here the method of handling and paying widow's compensation for deceased World War Veterans?

Mr. Wilson: We object to it, if the court please, first, on the ground that it is not shown that this witness has anything to do with the payment of claims which, I believe will be admitted, comes out of Washington or some other place. I might be mistaken, am I, Mr. Gross?

The Witness: It is paid out of Washington.

Mr. Wilson: They are asking for an opinion on the law which, I think he should be qualified to express an opinion first.

Mr. Thurman: And, as Lawyer for the Veterans' [27] Administration, what has been your duties; what are your duties with respect to the investigating and preparing and interviewing with respect to awards made to widows of deceased veterans?

A. I represent the Administrator of Veterans' Affairs with respect to all claims within this jurisdiction, embracing not only active, live cases; that is, where veterans are still living, but with respect to veterans deceased and their dependents are paid. We handle all of those cases.

Q. And do you know of your own knowledge the

(Testimony of J. P. Gross.)

necessary steps a widow of a deceased veteran would take in obtaining an award? A. Yes, sir.

Q. Please state to the court and jury what those steps are.

A. Before I came to Arizona I was in Washington and handled all types and cases, and it is based on a Claim No. 526, which is an affidavit and an application made by the claimant based on the military service of some man and bearing a "C" number of claim number. This was all identified with one file. They are passed upon by a group of examiners and awards officers. They usually request evidence in support of the claims, such as marriage—— [28]

Mr. Wilson (Interrupting): If the court please, we object to this testimony on the grounds that the regulation of the department would certainly be the best evidence of what is done and what is the regulation in the matter of settlement and payment of claims, and this witness is not qualified on matters he now purports to testify to.

The Court: Go ahead.

Mr. Wilson: We except to the ruling of the court.

The Witness: In connection with every Application Form 526 by a beneficiary, they require evidence of a relationship, and that is usually in the form of a marriage certificate to support it, and if the evidence appears to be in order an award is made and a notice of that award is given the beneficiary.

(Testimony of J. P. Gross.)

Mr. Thurman: Have you in your files the original application for an award due on account of the death of a veteran signed by one Denzel Lane Rider?

A. Yes, sir.

Q. The unmarried widow of Arthur C. Rider?

A. Yes, sir.

Q. Will you produce it, please? [29]

A. Here is the original Form 526, July 24th, 1922 (handing document to Mr. Thurman).

Q. And this has been in your care and custody as Attorney for the Veterans' Bureau?

A. Yes, sir.

Mr. Thurman: Please mark the application for identification.

(The document was marked as Government's Exhibit 5 for Identification.)

Mr. Thurman: And this is in the same form as when you first received it?

A. Yes, sir; that is the original document.

Q. Has that signature on the back of it been there at all times?

A. Yes, sir.

Q. The same form and in the same manner?

A. Yes, sir.

Q. Has not been changed?

A. Not at all.

Mr. Thurman: I offer it.

Mr. Wilson: May we ask on voir dire?

Q. Are you the custodian of this document,

(Testimony of J. P. Gross.)

the particular one you have just identified, Mr. Gross?

A. That is by the delegation of the Administrator. [30]

Q. For this particular case or generally do you have custody of these?

A. I am designated under Section 5 for all cases within the jurisdiction.

Q. In Arizona, you mean? A. Yes, sir.

Q. This was never filed with you originally?

A. No, sir.

Q. You obtained this from some other party, did you? A. From Washington.

Q. From Washington, D. C.?

A. Yes, sir.

Q. But the office at Washington, D. C. is the proper custodian of the instrument?

A. I am the proper custodian of the instrument. They have delegated it to me, sir.

Mr. Wilson: We object to it on the ground the witness has not been qualified.

The Court: Overruled.

Mr. Wilson: Exception, please.

Mr. Thurman: Mark it in evidence.

(The document was marked as Government's Exhibit 5 in Evidence.)

Mr. Thurman: Subsequent to the presentation of the application in this case, did the department [31] ever grant an award? A. Yes, sir.

(Testimony of J. P. Gross.)

Q. And have you got the original copy of the award? A. Yes, sir.

Q. Will you produce it, please?

A. There it is right there (handing document to Mr. Thurman).

Mr. Thurman: Please mark the Award of Compensation for identification.

(The document was marked as Government's Exhibit 6 for Identification.)

Mr. Thurman: Mr. Gross, I will ask you if this exhibit that is marked for identification is the usual customary form sent to a widow when an award has been allowed by the department?

A. Yes, sir; it is.

Mr. Thurman: I offer the exhibit in evidence.

Mr. Wilson: And the same objection as to the former exhibit on the ground that this witness is not qualified, is not now shown to be the proper custodian of the instrument testified to.

The Court: The same ruling.

(The document was received as Government's Exhibit 6 in Evidence.)

Mr. Thurman: Mr. Gross, after an award has [32] been allowed, how is it paid?

A. It is paid on the United States Treasury check by the Disbursing Officer of the Veterans' Administration.

Mr. Wilson: Now, we object to that and move that it now be stricken, on the grounds that the

(Testimony of J. P. Gross.)

witness has not been qualified to testify how the award was made and the manner of the payment or if it ever was paid.

Mr. Flynn: Do you know just generally, not talking about this specific case?

Mr. Thurman: Just asked him about the general custom.

Mr. Wilson: We object on the ground it is not applicable to the issues in this case; has no bearing, not material.

The Court: The answer may stand.

Mr. Wilson: Exception.

Mr. Thurman: Please mark this for identification.

(The document was marked as Government's Exhibit 7 for Identification.)

Mr. Thurman: We offer Government's Exhibit No. 7 for identification in evidence.

Mr. Wilson: And the same objection, if the court please, as to the former two exhibits. [33]

Mr. Thurman: That is a certified copy.

Mr. Wilson: Our objection the same as to the former two exhibits.

The Court: It may be received.

Mr. Thurman: Please mark that in evidence.

(The document was received as Government's Exhibit 7 in Evidence.)

Mr. Wilson: Exception.

Mr. Thurman: When an award has been al-

(Testimony of J. P. Gross.)

lowed, how are the awards kept track of, do you know; that is, how are they designated?

A. They are designated by numbers and identified by numbers assigned to each individual payee's case and those are borne out not only on the claim itself, on the award itself, but also on the checks issued by the United States Treasurer.

Q. Would any two awards have the same number?

A. Yes, sir; it should be stamped on the face of the check.

Q. I say, would any two different awards, say an award was made to a widow A, B or C, would they likely have the same number?

A. No two awards would have the same number.

Q. Referring you to Government's Exhibit No. 6 in evidence, I will ask you if you can find the award number in this particular matter? [34]

A. The award number "C", sir, is "C-824,832".

Q. And if there was a "X" before it, what would that "X" mean?

A. "X" would mean that the party was then deceased.

Q. And referring to Government's Exhibit No. 7 in evidence, I will ask you if you will find the number on the face of the checks of the award?

A. Yes, sir; it appears at the right-hand corner of the payee's name, "XC-824832".

Mr. Thurman: Please mark this piece of paper for identification.

(Testimony of J. P. Gross.)

(The document was marked as Government's Exhibit 8 for Identification.)

Mr. Thurman: Mr. Gross, I hand you Government's Exhibit 8 for identification. Is it a part of your records filed in this case now before the court?

A. Yes, sir; it is.

Q. And there is the signature of who?

A. Mrs. Denzel Rider.

Mr. Thurman: I offer it.

Mr. Wilson: May I ask this one question?

Q. Did you see Mrs. Denzel Rider write this signature? A. No, sir. [35]

Mr. Wilson: We object to it on the grounds it is not duly qualified to be received in evidence as a letter written by this defendant; no connection has been shown.

The Court: It may be received.

(The document was received as Government's Exhibit 8 in Evidence.)

Mr. Thurman: The number as set forth here in Government's Exhibit 8 in evidence, does it correspond with the number on the checks and in the award?

A. The number is XC-824832; XC-824832 (checking documents). It corresponds.

Mr. Flynn: I'd like to take up the exhibits with the jury briefly.

Mr. Wilson: At this time before counsel exhibits the exhibits to the jury, may we move to strike Government's Exhibit No. 7 on the ground

(Testimony of J. P. Gross.)

it appears to be merely a copy, and the proper foundation for the receipt of secondary evidence has not been offered?

The Court: Which was that?

Mr. Flynn: That was certified.

Mr. Wilson: That is the one that listed the checks, and one thing or another. I believe this defendant is entitled to receive the original [36] checks.

The Court: A certified copy is sufficient.

Mr. Wilson: An exception.

The Court: Now, it is almost 12. You can read those after lunch. We will suspend until 2, gentlemen. Keep in mind the court's admonition.

(A recess was taken at 12 o'clock noon.)

2 o'clock P. M., after recess on the same day, all parties as noted by the Clerk's record being present, the trial resumed as follows:

J. P. GROSS

resumed the witness stand and testified further as follows:

Direct Examination

(Resumed)

Mr. Thurman:

Q. Mr. Gross, referring to Exhibit No. 6 in evidence which was an award of compensation, how did this department notify the recipients of an award after they were made, generally?

A. They sent them a letter notifying them that

(Testimony of J. P. Gross.)

the award on the application previously filed had been granted, and telling them the conditions under which the award was made and under which it was continued.

Q. And all the department would have, would be a copy of that notice of award? [37]

A. That is right.

Q. That is, the original would be sent to the party who was the recipient in this case, would be the widow? A. The beneficiary, yes.

Mr. Flynn; Now, if the court please, I will now read from Government's Exhibit No. 1 in this matter, the application of George V. Lane and Denzel Morgan for a license to marry.

(The document was then read to the jury by Mr. Flynn.)

Mr. Flynn; Exhibit No. 3 shows the signature of Denzel Rider Morgan. Exhibit No. 5 is the application of widow, child or dependent parent.

(The document was then read to the jury by Mr. Flynn.)

Mr. Flynn: And Exhibit No. 7 consisting of a series of six checks on the Treasurer of the United States. The first check on the exhibit is dated June 30th, 1940.

(Thereupon Government's Exhibits No. 7 and 8 were read to the jury by Mr. Flynn.)

Mr. Thurman: Take the witness.

(Testimony of J. P. Gross.)

Cross Examination

Mr. Wilson:

Q. I don't know, Mr. Gross, whether you [38] testified on direct examination that you had made an investigation in this case?

A. I didn't so testify, but I did.

Mr. Wilson: Well, that is all right if you didn't. I won't inquire, then, into it. That is all, if the court please.

Mr. Thurman: That is all, thank you.

(The witness was excused.)

Mr. Thurman: We rest, your Honor.

DEFENDANT'S CASE

Mr. Wilson: Call the defendant.

DENZEL RIDER

was called as a witness in her own behalf, and being first duly sworn, testified as follows:

Direct Examination

Mr. Wilson:

Q. Your name is Denzel Rider?

A. That is right.

Q. The defendant in this cause? A. Yes.

Q. And, Mrs. Rider, I believe you were born [39] and raised in the State of Indiana, is that right?

A. Yes.

(Testimony of Denzel Rider.)

Q. And in what year were you born, Mrs. Rider?

A. Well, I am 47. I'd have to count back. I was 47 the 12th of September and I'd have to count back on that.

Q. You married Arthur C. Rider?

A. Yes.

Q. A World War Veteran? A. Yes.

Q. And when did you marry him and where?

A. In Anderson, Indiana on the 3d day of April, 1920.

Q. And are there any children as a result of that marriage? A. Yes.

Q. How many? A. One.

Q. And his name is Vaughn Rider?

A. Yes.

Q. And when was he born?

A. On February 20th, 1921.

Q. And is he now residing with you?

A. No, he is in the army. I have a telegram he is on his way here.

Q. I see, all right. When did Mr. Arthur C. [40] Rider die? A. On July 14th, 1922.

Q. And since then, Mrs. Rider, you have been awarded a Government pension of approximately \$30.00 a month by the Federal Government?

A. Yes.

Q. As the widow of Arthur C. Rider, a veteran of the World war? A. Yes, sir.

Q. And ever since that time you have collected that pension, have you? A. Yes.

Q. Up until what time?

(Testimony of Denzel Rider.)

A. I received a notice from the Veterans' Claim Bureau on December—the letter was written on December 4th, 1940, and I received it about the 8th of December, 1940.

Q. Since then you have not received the widow's pension? A. No.

Q. It has been denied you, is that right?

A. Yes.

Q. How long have you resided in the City of Phoenix, Arizona, approximately?

A. Since October, 1931.

Q. And what business are you now engaged in [41] and have been for the past several years?

A. Parking lot business, parking automobiles and selling gasoline.

Q. You are operating a parking lot for automobiles? A. Yes, sir.

Q. And run a service station?

A. Yes, sir.

Q. You do that personally, do you?

A. Yes, sir.

Q. And where is your place of business located?

A. At Second Street and Monroe. It is on Second Street.

Q. On Second Street?

A. And Monroe, on the southeast corner.

Q. How long have you been engaged in that business?

A. Started in the parking lot business in October of 1937.

(Testimony of Denzel Rider.)

Q. When, Mrs. Rider, did you first meet a man known as George V. Lane, about when?

A. Well, it was about the latter part of March or the first of April. It was about six weeks after I had wired the Attorney General's office for help. [42]

Q. What year? A. 1939.

Q. The latter part of March or the early part of April, 1939, is that right?

A. Yes, that is right.

Q. Prior to that day, had you had any difficulty concerning any of your property, personal property? A. Yes, sir.

Q. At that time were you asserting any claim against people for the theft of your property?

A. Yes, sir.

Q. And at that time and prior thereto, had you been assaulted physically by any parties in the City of Phoenix because of this claim?

Mr. Thurman: I object to that as immaterial, incompetent and irrelevant.

The Court: What does that have to do with this?

Mr. Wilson: Your Honor, this is all, I might say our whole defense goes to the question of criminal intent. The statute provides that the Government must show that this was done to defraud the United States Government and I propose to show by this witness the claim that she had made because of this property, the appeal to the [43] authorities and the advent of George V. Lane representing

(Testimony of Denzel Rider.)

himself to be with the Department of Justice, and to show what has happened from that time on up to the present moment. Now, if there be any question on the law, I think I am prepared to show it.

The Court: Well, I will sustain the objection, then.

Mr. Wilson: All right, an exception, please, to the ruling of the court.

Q. Had you, prior to the time you met George V. Lane, applied to the Department of Justice of United States for assistance in your behalf?

A. Yes.

Mr. Thurman: I object to that on the same ground that I objected to before.

The Court: The same ruling.

Mr. Wilson: Exception, please, to the ruling of the court. Did you overrule it?

The Court: No, I said the same ruling.

Mr. Wilson: Oh, the same ruling, that is what I thought. May we have an exception.

Q. And let me ask you, Mrs. Rider, if this, showing you a telegram, or I am making this more in the nature of proof. I would like to have a conference with your Honor, because I don't want [44] to do anything that does now appear to be discourteous, but I will make an offer of proof to your Honor what I intend to prove, and if your Honor is going to sustain it all the way through, then we can rest our case. Is that the telegram you sent to the Department of Justice on the latter part of January, 1939?

(Testimony of Denzel Rider.)

Mr. Thurman: I object to the question, immaterial and incompetent.

The Court: It has not been offered.

The Witness: Yes, this is the telegram I wired. It is a copy of the telegram.

Mr. Wilson: And showing you this letter, is that the letter that you received from the Department of Justice in answer to your telegram?

A. Yes, sir.

Mr. Wilson: Now, we offer this telegram in evidence, if the court please, at this time. It is so badly worn that I will leave it there just temporarily and we will offer the letter also.

Mr. Thurman: We object to that, your Honor, as being incompetent, immaterial and irrelevant.

The Court: All right, let me see it.

(The documents were handed to the court.)

Mr. Wilson: That other is not offered, your Honor, at this time. I think they are all [45] attached together.

Mr. Thurman: We make a further objection, your Honor, that it is self-serving also.

The Court: I don't see what it would have to do with this case. I don't see any connection with the matter charged in this indictment.

Mr. Wilson: Except that it will touch upon the question of criminal intent of the accused in doing the things set out in the indictment, the things which she is charged with doing that constitute the crime.

(Testimony of Denzel Rider.)

The Court: The objection will be sustained.

Mr. Wilson: All right, and may we have an exception to the ruling of the court, and may these be marked for identification in the case?

The Clerk: Do you want this as one exhibit?

Mr. Wilson: No, I want them as separate exhibits.

The Clerk: The telegram will be Defendant's Exhibit "A" for Identification; the letter is Defendant's Exhibit "B" for Identification.

Mr. Wilson: Following that, Mrs. Lane, I believe you already testified then in March or the early part of April you met George V. Lane?

A. My name is Rider.

Q. What? [46]

A. You called me "Lane".

Q. I said, "Mrs. Rider". I said, you met George V. Lane, did you, in March or April, 1939?

A. Yes.

Q. Where did you meet him?

A. He came to my parking lot on Second Street and Monroe about 2 o'clock in the afternoon.

Q. Was he in company with anyone, or was he alone? A. He was alone.

Q. Was he carrying anything at the time?

A. A briefcase.

Q. Will you tell the conversation that you had with George V. Lane at that time?

A. Well, when people come on my parking lot, most of my people pay by the week——

(Testimony of Denzel Rider.)

Mr. Thurman: I think that is highly objectionable about relating this conversation with this man Lane at that time. There is a marriage that has been proved here in this court room, and it is self-serving.

The Court: What was the date of this visit, before or after the alleged——

Mr. Wilson (Interrupting): This was in the latter part of March or early part of April, 1939.

The Court: It is rather hard to tell whether [47] it would be material or not.

Mr. Thurman: Your Honor, I don't believe it would be admissible unless the witness would admit the marriage. The marriage is proven here.

The Court: Well, I will sustain the objection.

Mr. Wilson: May there be an exception to the ruling of the court. Now, may I have a conference with counsel and with your Honor just to shorten this matter and to show to the court what we——

(The following discussion was had at the Bench between court and counsel not audible to the jury).

Mr. Wilson: We now make a formal tender of proof in this case, and the proof all goes to the question solely on the intent of the accused that the crime—at the time she performed the acts charged against her in the indictment and which it is claimed constituted a crime. To that we will attach the documents that will corroborate it.

The Court: Have you read this?

(Testimony of Denzel Rider.)

Mr. Thurman: I have not.

Mr. Wilson: These exhibits should be attached to it.

Mr. Thurman: I want to object to the offer of proof of the defendant in this case, for the reason is it self-serving, incompetent, irrelevant and immaterial, and there is no basis for defense [48] in this action.

The Court: I think that is true; self-serving.

Mr. Wilson: And the ruling of the court is sustaining the objection?

The Court: Yes.

(Counsel then resumed their places in the court room and the following proceedings were continued within the hearing of the jury.)

Mr. Wilson: At this time, if the Court please, the defendant respectfully excepts to the ruling of the court denying our right to substantiate our offer of proof, and may we have the privilege of having our offer of proof with the documents supporting it made exhibits in this case?

The Court: Yes.

(The documents were received and marked as Defendant's Exhibit "C" for Identification.)

Mr. Wilson: If the court please, the defendant at this time will rest. That is all, Mrs. Rider, you may come off the stand.

The Court: Do you have any cross examination?

Mr. Thurman: No cross examination.

Mr. Flynn: Shall we proceed with the argument?

The Court: Yes. [49]

Mr. Wilson: At this time, however, if the court please, the defendant, in view of the fact that the testimony is closed and the Government and the defendant have rested, we now move the court for an order directing the jury in this case to return a verdict of not guilty on each count in the indictment, on the grounds that the proof offered by the Government is not sufficient to prove the allegations of the indictment or the commission of any crime by this accused beyond any reasonable doubt, that there is complete failure of proof to show that this accused, on the 14th day of June, 1939, or at any time or place ever contracted marriage with any man, or to show that she was not, when she was not, when she endorsed those checks, the unremarried widow of Arthur C. Rider, and upon that we move for a directed verdict.

The Court: The motion is denied.

Mr. Wilson: And may there be an exception?

The Court: Yes.

(Thereupon arguments were presented to the jury by counsel for the respective parties, after which the court instructed the jury as follows:)

[50]

The Court: Gentlemen, it now becomes the court's duty to instruct you as to the law that applies to this particular case. I will read a portion of the World War Veterans' Relief Act:

“The surviving widow, child, or children of and deceased person who served in the World War before November 12th, 1918, or if the person was serving with the United States military forces in Russia before April 2d, 1920, who, while receiving or entitled to receive compensation, pension, or retirement pay for 10 per centum disability or more presumptively or directly incurred in or aggravated by service in the World War, dies or has died from a disease or disability not service connected shall, upon filing application and such proofs in the Veterans' Administration as the Administrator or Veterans' Affairs may prescribe, be entitled to receive compensation”, or

“The surviving widow, child, or children of any deceased person who served in the World War before November 12, 1918, or if the person was serving with the United States military forces in Russia before April 2d, 1920, and who was honorably discharged after having served ninety days or more, or who, having served less than ninety days, was discharged for disability incurred in [51] the service in the line of duty, who dies or has died from a disease or disability not service connected and at the time of death had a disability directly or presumptively incurred in or aggravated by service in the World War for which compensation would be payable if 10 per centum or more in degree, shall, upon filing application and such proofs in the Veterans' Admin-

istration as the Administrator of Veterans' Affairs may prescribe, be entitled to receive compensation.

“The monthly rates of compensation shall be as follows: Widow but no child, \$30.00; widow with one child, \$38.00—

“The term ‘person who served’ shall mean a person, whether male or female, and whether commissioned, enlisted, enrolled, or drafted, and who was finally accepted for active service in the military or naval forces of the United States, members of training camps authorized by law, and such other persons heretofore recognized by statute as having a pensionable status.

“An and after May 13th, 1938, for the purpose of payment of compensation under the laws administered by the Veterans' Administration, the term ‘widow of a World War veteran’ shall mean a woman who was married prior to May 13th, 1938 to the [52] person who served: Provided, that all marriages shall be proven as valid marriages according to the law of the place where the parties resided at the time of marriage or the law of the place where the parties resided when the right to compensation accrued. Compensation shall not be allowed a widow who has remarried either once or more than once, and where compensation is properly discontinued by reason of remarriage it shall not thereafter be recommenced.

“The penal and forfeiture provisions relating to pensions and compensation contained in section 701-703, 704, 705, 706, 707-715, 716-721 of this title shall be applicable to claims for compensation under the sections.” I have just read.

“Whoever shall obtain or receive any money, check or pension under sections 701-703, 704, 705, 706, 707-715, 716-721 of this title, and under sections 30a, 485 or Title 5 or regulations issued thereunder without being entitled to the same, and with intent to defraud the United States or any beneficiary of the United States, shall be punished”

as in that section provided.

The intent or the intention is manifested by the circumstances connected with the transaction, and the sound mind and discretion of the accused. [53] The intent with which an act is committed being but a mental state of the party accused, direct proof of it is not required; nor, indeed, can it ordinarily be so shown, but it is generally derived from and established by all the facts and circumstances attending the doing of the act complained of as disclosed by the evidence. In order for you to determine this question, you will look to all the evidence, oral and documentary in the case, and to all the facts and circumstances in connection therewith.

Every man is presumed to intend the natural and probable consequences of his own act.

By the finding of an indictment no presumption

whatsoever arises to indicate that a defendant is guilty, or that he has had any connection with, or responsibility for, the act charged against him. A defendant is presumed to be innocent at all stages of the proceedings until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt. And this rule applies to every material element of the offense charged. Mere suspicion will not authorize a conviction. A reasonable doubt is such a doubt as you may have in your minds when, after fairly and impartially considering all of the [54] evidence, you do not feel satisfied to a moral certainty of the defendant's guilt. In order that the evidence submitted shall afford proof beyond a reasonable doubt, it must be such as you would be willing to act upon in the most important and vital matters relating to your own affairs.

Reasonable doubt is not a mere possible or imaginary doubt or a bare conjecture; for it is difficult to prove a thing to an absolute certainty.

You are to consider the strong probabilities of the case. A conviction is justified only when such probabilities exclude all reasonable doubt as the same has been defined to you. Without it being restated or repeated, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered in connection with and as accompanying all the instruction that are given to you.

In judging of the evidence, you are to give it a

reasonable and fair construction, and you are not authorized, because of any feeling of sympathy or other bias, to apply a strained construction, one that is unreasonable, in order to justify a certain verdict when, were it not for such feeling or bias, you would reach a contrary conclusion. And, whenever, after a careful consideration of [55] all of the evidence, your minds are in that state where a conclusion of innocence is indicated equally with a conclusion of guilt, or there is a reasonable doubt as to whether the evidence is so balanced, the conclusion of innocence must be adopted.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testified; by the character of his testimony, or by evidence affecting his character for truth, honesty and integrity or his motives; or by contradictory evidence. In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men. You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to the Government or the defendant, the manner in which he might be [56] affected by the verdict and the extent to which he

is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility. If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that by which men given their attention to any question depending upon evidence presented to them. You are expected to use your good sense, consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains the Government is entitled to a verdict. Jurors are expected to agree upon a verdict where they can conscientiously do so; you are expected to consult with one another in the jury room and any juror should not hesitate to abandon his own [57] view when convinced that it is erroneous. In determining what your verdict shall be you are to consider only the evidence before you. Any testimony as to which an objection was sustained, and any testimony which was ordered stricken out, must be wholly left out of

account and disregarded. The opinion of the judge as to the guilt or innocence of a defendant, if directly or inferentially expressed in these instructions, or at any time during the trial, is not binding upon the jury. For to the jury exclusively belongs the duty of determining the facts. The law you must accept from the court as correctly declared in these instructions.

After you retire to your jury room you will select one of your number to act as foreman and proceed with your deliberations. Any verdict agreed upon must be signed by your foreman and returned into open court and, of course, you understand that any verdict agreed upon must be the unanimous verdict of the jury.

A form of verdict has been prepared for your guidance. Omitting the title of the court and the cause, the verdict reads:

“We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find [58] the defendant Denzel Rider blank as charged in count one of the indictment, blank as charged in count two of the indictment, blank as charged count three of the indictment, blank as charged in count four of the indictment, blank as charged in count five of the indictment, and blank as charged in count six of the indictment. You will insert in the blanks either “Guilty” or “Not Guilty”, whatever your verdict may be.

You may swear the bailiffs to take care of the jury.

(Thereupon the bailiffs were sworn and the jury retired from the court room at 3:47 o'clock P. M. of the same day to deliberate on its verdict.)

The trial ended at 3:47 o'clock P. M. of the same day. [59]

I Hereby Certify that the proceedings had and the evidence given upon the trial of this cause is contained fully and accurately in the shorthand notes taken by me of said trial, and that the foregoing 59 pages contain a full, true and accurate transcript of the same.

LOUIS L. BILLAR

Official Shorthand Reporter.

[Endorsed]: Filed Jan. 15, 1943.

[Endorsed]: No. 10335. United States Circuit Court of Appeals for the Ninth Circuit. Denzel Rider, Appellant vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed February 13, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10335

DENZEL RIDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL AND DESIGNATION OF RECORD
ON APPEAL.

The appellant, Denzel Rider, adopts the Assignments of Error filed in the District Court as the points on which she intends to rely in this appeal, and designates the printing of the transcript of the record in its entirety, excepting the Government's exhibits other than as set forth in the Bill of Exceptions, as prepared and sent up by the Clerk of the District Court.

Dated at Phoenix, Arizona, this 11th day of February, 1943.

ROBERT R. WEAVER

GEO. T. WILSON

Attorneys for Appellant.

Received copy this 11th day of February, 1943.

FRANK E. FLYNN

United States Attorney

[Endorsed]: Filed Feb. 15, 1943. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION TO ELIMINATE GOVERN-
MENT'S EXHIBITS IN PRINTED AB-
STRACT OF RECORD.

To obviate the necessity of printing the Govern-
ment's exhibits at length in the printed abstract of
record on the appeal of this cause,

It Is Stipulated and Agreed by and between the
Government, represented by the Honorable Frank
E. Flynn, United States Attorney for the District
of Arizona, and the defendant appellant, repre-
sented by Robert R. Weaver and George T. Wilson:

1. That the defendant admits that the Govern-
ment's evidence, oral and documentary, introduced
upon the trial of this cause is sufficient in the ab-
sence of the evidence tendered by defendant in her
written offer of affirmative proof, marked Exhibit
"C" for Identification in the records of this cause,
to support the verdict of the jury rendered in said
cause; and

2. That the only question defendant-appellant
will raise on the appeal of this cause is the ruling
of the trial court sustaining the government's ob-
jection to the defendant's testimony as substantially
set forth in said written offer of affirmative proof.

Dated this 8th day of March, 1943.

FRANK E. FLYNN

United States Attorney for
the District of Arizona.

ROBERT R. WEAVER

GEO. T. WILSON

Attorneys for Appellant

[Endorsed]: Filed March 11, 1943. Paul P.
O'Brien, Clerk.

No. 10335

In The
United States
Circuit Court of Appeals
For the Ninth Circuit 9

DENZEL RIDER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT

UPON APPEAL FROM THE DISTRICT COURT
OF THE UNITED STATES FOR THE
DISTRICT OF ARIZONA

GEO. T. WILSON,
ROBERT R. WEAVER,
Attorneys for Appellant,
707 Title & Trust Bldg.,
Phoenix, Arizona.

MAY - 3 1943



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PAUL P. O'BRIEN,
CLERK

In The
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In The
United States
Circuit Court of Appeals
For the Ninth Circuit

DENZEL RIDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

Appellant was indicted, tried, and convicted for a violation of Sections 510 and 714, Title 38, U. S. C. A., in that she unlawfully received a widow's pension as the unremarried widow of a World War Veteran with the intent to defraud the United States.

The facts developed at the trial, briefly stated, show that appellant married one Arthur C. Rider, a World War Veteran, at Anderson, Indiana, on April 3, 1920. One child, Vaughn Rider, was born to this union, and thereafter, on July 14, 1922, Arthur C. Rider died (Tr. 45). Appellant was then awarded a widow's pension by the Government in

the sum of approximately \$30.00 per month pursuant to Sections 503 and 504, Title 38, U. S. C. A. The amount of the pension varied from time to time through amendments to the original pension act, but, whatever the amount, appellant continued to receive the pension to and including the month of November, 1940 (Tr. 45, 46).

In 1931 she removed with her son to Phoenix, Arizona (Tr. 46), and on July 16, 1942, she was indicted in six counts for receiving and cashing six monthly pension checks for the months of June, July, August, September, October and November, 1940, as the unremarried widow of Arthur C. Rider, with the intent to defraud the United States (Tr. 2). At the trial the Government established that on June 14, 1939, at Nogales, Arizona, appellant married one George V. Lane, and that at the time she received, endorsed, and cashed the six monthly pension checks in 1940, she was not the unremarried widow of Arthur C. Rider. Her receipt and retention of the pension checks, the Government claims, was done with the intent on her part to defraud the United States. This was the sole issue involved.

On this issue appellant offered to testify, and to corroborate her testimony by documentary evidence and the testimony of other persons, that she fully believed, because of the circumstances leading to and surrounding her marriage to Lane, such marriage was void, and at the time she received, endorsed, and cashed the six pension checks mentioned in the indictment, she was lawfully entitled to them. The circumstances of her marriage to Lane and the relevant events immediately prior and subsequent thereto are set forth in detail in her Offer

of Affirmative Proof and need not be repeated here (Tr. 51-55). Her proof was directed solely to the issue of criminal intent and was intended to negative the allegations of the indictment that in accepting and retaining the pension checks she did so with intent to defraud the United States (Tr. 55).

Objection to the Offer of Proof was sustained by the court on the ground it was self serving (Tr. 51). The case was then submitted to the jury on the Government's evidence alone, and the jury returned a verdict of guilty on each count of the indictment (Tr. 12-13).

This appeal challenges the ruling of the trial court in denying appellant the right to submit the facts disclosed in her Offer of Proof to the jury on the grounds that such evidence was material and relevant on the issue of her intent, motive, and state of mind in accepting and retaining the six pension checks in question.

SPECIFICATIONS OF ERROR

Appellant relies upon the Assignments of Error set forth below under the appropriate specification to which they relate. The sole Specification of Error and the sole question raised by the Assignments of Error are:

SPECIFICATION OF ERROR I.

Did the Court err in rejecting the evidence of appellant contained in her Offer of Affirmative Proof (Tr. 51-55), and in refusing to permit her to testify in her own defense that she believed, when ac-

cepting and retaining the six monthly pension checks charged in the indictment, she was acting lawfully and within her rights? (Assignments of Error I, II, III and IV, Tr. 22-29).

ARGUMENT

SPECIFICATION OF ERROR I.

The argument will be directed to the Fourth Assignment of Error only, as the subject of the first three assignments are likewise a part of the fourth assignment and all are supported by the same proposition of law.

At the outset, we offer as a general proposition of law, that, whenever a statute makes a specific intent an element of the crime defined in the statute, as in the instant case, or whenever the intent of the accused in doing the acts charged in the indictment becomes material, such intent is the gravamen of the offense, and direct testimony by the accused of the want of any evil intent, motive, or state of mind, and the grounds therefor, is material and relevant.

The Government's evidence in this case, in the absence of any showing by the appellant, is unquestionably sufficient to support the verdict of the jury. Appellant does not dispute the ultimate fact of her marriage to George V. Lane, or of her receipt and retention thereafter of the six pension checks charged in the indictment. Her whole defense, as disclosed by her Offer of Affirmative Proof (Tr. 51-55), is predicated on her belief that her marriage to Lane was void and, in any event, did not affect her right

to these checks. In short, she admits every act attributed to her, but denies that such acts were induced by any design to defraud the United States or any other person, or to violate any law.

Sections 510 and 714, Title 38, U. S. C. A., under which the indictment in this case is laid, provides:

(Sec. 510). "The penal and forfeiture provisions relating to pensions and compensation contained in sections 701-703, 704, 705, 706, 707-715, 716-721 of this title shall be applicable to claims for compensation under sections 34, 101-104, 131-134, 424a, 445d, 472a, 472b, 472d, 472e, 503-505, 506, 507, 507a and 512c of this title. (Aug. 16, 1937, Ch. 659, Sec. 9, 50 Stat. 662)."

(Sec. 714). "Whoever shall obtain or receive any money, check, or pension under sections 701-703, 704, 705, 706, 707-715, 716-721 of this title, and sections 30a, 485 of Title 5 or regulations issued thereunder, without being entitled to the same, and with intent to defraud the United States or any beneficiary of the United States, shall be punished by a fine of not more than \$2,000, or by imprisonment for not more than one year, or both. (Mar. 20, 1933, Ch. 3, Title 1, Sec. 14, 48 Stat. 10)."

Manifestly, the gravamen of the offense denounced by these sections is the corrupt intent. In this, the offense differs from those crimes which become such merely by the deliberate performance of the act prohibited, as in bigamy, and the intent, motive, or state of mind of the accused at the time of the commission of the alleged offense becomes the determin-

ing factor. Proof of the criminal intent in this case, therefore, becomes as important and necessary to the prosecution as that of any other element. Such proof, of course, may consist of direct or circumstantial evidence, but the fact that intent is more often established by circumstances and conditions surrounding the commission of an offense does not preclude direct evidence on that issue. This is particularly true of the evidence of the accused.

On this point *Wharton's Criminal Evidence* (11th Ed.) Vol. 3, page 423, states:

“With the exception of one state, the rule is universal that, on a prosecution for a crime, whenever the intent of the accused is relevant to the issue or whenever the intent of the accused in doing the act charged becomes material, the accused may testify as to his own motive and intent, or state of mind.”

Such testimony is not limited to a bare denial of the criminal intent by the accused, for such denial, unsupported by the facts and circumstances which induced the belief in the accused of his right to do the act condemned, would oftentimes be unintelligible and meaningless to the jury. Such would be the fact in the instant case. Were appellant, here, confined to a bare denial of improper motive or intent in receiving and retaining the pension checks charged in the indictment, without the benefit of the facts of the attempted fraud on her, which induced the belief in her that in receiving and retaining the checks she was acting lawfully, it would avail her nothing by way of defense. Recognizing the futility of such restriction, the courts have held, with singu-

lar unanimity, that evidence by the accused, touching his intent, motive, or state of mind at the time of the commission of an alleged offense, may extend to the grounds which induced the belief of the lawfulness of his act, and may include heresay evidence.

In *Potter v. United States*, 155 U. S. 438, 15 Sup. Ct. 144, 39 L. Ed. 214, the Supreme Court, in holding that the word "wilful" is synonymous with intent, said:

(p. 448). "As 'wilful' wrong is of the essence of the accusation, testimony bearing directly on the question of the wilfulness is of vital importance, and error in rejecting it cannot be regarded otherwise than as material and manifestly prejudicial."

To the same effect is a holding of the Appellate Court of the Eighth Circuit in *Buchanan v. United States*, 233 Fed. 257, 259:

"Whenever the belief of a person, or the motive or intent of his act or conduct, is material, he may testify directly what it was. Wigmore on Ev., Sec. 581. He may also give the grounds of the belief upon which his motive or intent proceeded, including the statements of third persons to him. Id. Secs. 245, 655, 1789."

The same rule is announced by the Fourth Circuit in *Hyde v. United States*, 15 Fed. (2) 816, 821:

"The crucial question in the case is whether or not there was an intent on the part of the

actors to deceive and defraud the officials of the Government or to misappropriate funds of the bank. The bona fides, the intent, purpose, and motive, of what was done constituted the vital and important element of the entire transaction, and therefore anything that took away from the consideration of the jury facts that might explain motives and purposes of the actors was a necessary and important matter in determining the character of the transaction, and its legality or illegality, and the guilt or innocence of the accused."

That this rule of evidence is applicable to both the prosecution and the defendant, see the decision by the Seventh Circuit in *Norcott v. United States*, 65 Fed. (2) 913, 919:

"The intention of the appellants is a most vital element in this cause For this reason circumstantial evidence, as in other cases, must play an important part in the determination of that fact, and all circumstances which reasonably throw light upon that subject, either directly or indirectly, should be received in evidence on behalf of both the government and those charged with crime. (Cert. denied, 290 U. S. 694, 54 S. Ct. 130, 78 L. Ed. 597)."

For additional authorities on this question, see *Wallace v. United States*, 162 U. S. 466, 477, 16 S. Ct. 859; *Crawford v. United States*, 212 U. S. 183, 29 S. Ct. 260, 53 L. Ed. 465; *Miller v. United States*, 120 Fed. (2) 968.

The foregoing decisions and the rule of evidence

they announce are unquestionably applicable to the facts presented by the record in this case. The statute (Sections 510 and 714, *supra*) denounces the receipt and retention of pension checks under circumstances similar to those in the present case only when done with the intent to defraud the United States or any beneficiary of the United States; hence, appellant may have been guilty of all of the acts charged against her, but, in the performance of those acts, if she was not prompted or actuated by an improper motive or intent, she committed no crime. Her intent, therefore, determines her guilt or innocence. On that vital issue the jury were entitled to all the enlightenment possible, as it remained with them to correctly appraise her intent and motive. By the ruling of the trial court they were compelled to rest their determination of that issue on the evidence of the Government alone.

The reasonableness or logic of the facts disclosed in the appellant's Offer of Proof, their probability or improbability, the effect that they might have produced on the mind of another person, are matters with which we are not here concerned. It is sufficient if these facts produced such mental condition in appellant she could truthfully say that she honestly believed she was entitled to the checks and that in accepting and retaining them she did so under such belief, and not through design to perpetrate a fraud upon the revenues of the Government. The effect and weight of such evidence was for the jury's determination. Her right to submit that evidence for the jury's consideration is unques-

tioned, and the ruling of the trial court denying her that right is, we believe, prejudicial error.

Respectfully submitted,

GEO. T. WILSON,
ROBERT R. WEAVER,

Attorneys for Appellant.

No. 10335

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

DENZEL RIDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

MOTION TO DISMISS APPEAL
AND
APPELLEE'S BRIEF

Upon Appeal from the District Court of the United
States for the District of Arizona

FILED

MAY 24 1943

PAUL P. O'BRIEN,
CLERK

FRANK E. FLYNN,
United States Attorney.

E. R. THURMAN,
Assistant U. S. Attorney.

JAMES A. WALSH,
Assistant U. S. Attorney.
Attorneys for Appellee.





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IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

DENZEL RIDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

MOTION TO DISMISS APPEAL

COMES NOW United States of America, appellee herein, and moves this Honorable Court that the appeal in the premises be dismissed for the reason that the appellant was placed on probation with imposition of sentence suspended, and, therefore, there was no final judgment from which an appeal would lie.

WHEREFORE appellee prays that appellant's appeal in the premises be dismissed and that appellee recover its costs herein expended.

FRANK E. FLYNN,
United States Attorney.

E. R. THURMAN,
Assistant U. S. Attorney.

JAMES A. WALSH,
Assistant U. S. Attorney.
Attorneys for Appellee.

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
TO DISMISS APPEAL

In support of the above and foregoing motion, it will be noticed that the court issued the following judgment (T.R. 14) :

“JUDGMENT

“Due proceedings having been had on the indictment filed herein presented against the defendant above named charging a violation of Title 38, Sections 510 and 714, United States Code, to-wit: wrongfully, unlawfully and fraudulently receive certain compensation from the United States with the intent to defraud the said United States, as charged in each of counts one to six of said indictment.

“It appearing to the Court that the best interests of the defendant and the Government will be subserved thereby,

“It Is Ordered that the imposition of judgment and sentence herein be suspended for the period of five (5) years from and after this date and that said defendant be placed on probation during said period, on condition that she make restitution of the money unlawfully received, within six months from this date.

“Dated December 7, 1942.

DAVE W. LING,
Judge.”

It is evident from reading the above and foregoing that there has been no final judgment entered in the premises from which an appeal would lie, and in support thereof we cite the following cases:

United States v. Albers, et al., 115 F. (2d) 833 (C.C.A. 2), wherein it is held, on page 834 of the opinion, as follows:

“The appeals of the five appellants placed on probation with imposition of sentence suspended must be dismissed. There is a distinction between suspending execution of sentence and suspending imposition of sentence. If sentence is imposed but execution thereof suspended, there is a final judgment from which an appeal will lie. *Berman v. United States*, 302 U. S. 211, 58 S.Ct. 164, 82 L.Ed. 204. But if imposition of sentence is suspended, no final judgment is entered; hence no appeal is possible. *Birnbaum v. United States*, 4 Cir., 107 F.2d 885, 126 A.L.R. 1207; *United States v. Lecato*, 2 Cir., 29 F.2d 694.”

and also

United States v. Mook, et al., 2 Cir., 125 F. (2d) 706.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

DENZEL RIDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

Without waiving the above and foregoing Motion to Dismiss appellant's appeal, and still urging and insisting upon said motion, we now proceed to answer appellant's opening brief.

ARGUMENT

There is but one assignment of error. Appellant complains that the Court erred in rejecting the evidence of appellant contained in her Offer of Affirmative Proof (T.R. 51-55) and in refusing to permit her to testify in her own defense that she believed, when accepting and retaining the six monthly pension checks charged in the indictment, that she was acting lawfully and within her rights.

Appellee finds no fault with the general proposition of law enunciated by appellant in her brief under Specification of Error I.

However, appellee contends that none of the cases set forth in appellant's brief, nor the general proposition of law set forth therein, are applicable to the legal proposition which arises under appellant's Specification of Error.

It will be noted at the bottom of page 6 of appellant's brief she states that her whole defense, as disclosed by her Offer of Affirmative Proof (T.R. 51-55), is predicated upon her belief that her marriage to Lane was void and, in any event, did not affect her right to the checks. She there admits every act attributed to her, but denies that such acts were induced by any design to defraud the United States or any other person, or to violate a law.

The Government takes the position that the general proposition of law, as stated on page 6 of appellant's brief, does not apply. In the instant case, the accused is attempting to excuse herself by asking the Court to permit her to show what her belief was as to her marital status with the said George V. Lane; and, of course, what her belief was as to the law with respect to her said marriage is immaterial and was properly excluded by the Court.

Christensen v. United States, 90 F. (2d)
152, 153.

Bridgeman v. United States,
140 F. 577, 590 (C.C.A. 9).

Fain v. United States,
265 Fed. 474 (C.C.A. 9).

Ford v. United States,
10 F. (2d) 339, 349 (C.C.A. 9).

In the Christensen case, *supra*, the Court held as follows:

“At the trial, appellant offered evidence tending to show that he believed the judgment was unjust and was for a sum larger than his indebtedness. The court excluded this evidence, and error is assigned on such exclusion.

“The fact that a judgment debtor believes a judgment rendered against him is excessive and is unjustifiable is not unusual. Such belief, whether sincere or not, does not, however, impeach the validity of the judgment, nor does it justify the judgment debtor in removing the record of such judgment from an abstract of title to real estate upon which it was apparently a lien. This evidence was properly refused.”

To the same effect is the Bridgeman case, *supra*, wherein the defendant was charged with having, as an Indian agent, made and presented a false claim and voucher against the United States, knowing the same to be false and fictitious. On page 590 of the opinion, it is held that testimony offered by the defendant to show a custom or practice of other Indian agents to sign and forward their accounts and vouchers as the same were prepared by the clerks, without reading them, was irrelevant and properly excluded.

This Honorable Court again followed the same rule in *Fain v. United States*, *supra*, wherein, on trial of a defendant for having, as special agent of the Land Department, presented false and fraudulent claims for expenses, evidence that regulations respecting expenses in other departments of the service were disregarded in practice was held properly excluded as immaterial.

Applying the rule enunciated in the foregoing cases to the appellant's Offer of Proof in this case, we come

to the conclusion that she was estopped to show her belief as to the legal status of her said marriage to the said George V. Lane, for she knowingly participated in the marriage ceremony, and she knew that she could not lawfully receive the checks in question unless she was the unmarried widow of Arthur C. Rider. What her intentions were at the time she entered into the said marriage with Lane is immaterial, for the marriage was performed and would be binding under the laws of the State of Arizona so long as it continued to exist. It would be a strange thing, indeed, if a defendant would be permitted to offer evidence in his defense to show that he did not intend to commit a crime because he did not believe his marriage to be valid. If defendant, on his trial, could go that far, he could go further and say he did not believe a certain law to be constitutional and therefore he had no intent to commit the act alleged.

Appellee takes the position that if all the things alleged in appellant's Offer of Proof are true, still the marriage would not be void, but merely voidable, for a marriage, the consent to which was induced by fraud or duress, is not void but voidable merely at the suit of the injured party.

Marriage, 38 C. J., par. 61, page 1300,
and cases cited.

Marriage, 38 C.J., par. 70, page 1304,
and cases cited.

*Southern Pacific Co. v. Industrial Commission
of Arizona*, 54 Ariz. 1; 91 Pac. (2d) 700.

It would make no difference what appellant thought the legal status of her marriage to Lane was, for it is a well settled principle that everyone is presumed to know the law of the land, both common and statutory,

and that one's ignorance of the law furnishes no exemption from criminal responsibility for his acts.

Criminal Law, 16 C.J., par. 52, page 84,
and cases cited.

Reynolds v. United States,
98 U.S. 145, 167.

Criminal Law, 22 C.J.S., par. 48, note 37,
page 115.

Blumenthal v. United States,
88 F. (2d) 522, 530.

In the *Blumenthal* case, *supra*, the court held as follows:

“It is elementary that every one is presumed to know the law of the land, whether that be the common law or the statutory law, and hence one's ignorance of the law furnishes no defense for criminal acts, and this rule applies where the crime charged is *malum prohibitum* or *malum in se*. (citing cases)”

In *Reynolds v. United States*, *supra*, the Supreme Court said:

“A criminal intent is generally an element of crime, but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does. Here the accused knew he had been once married, and that his first wife was living. He also knew that his second marriage was forbidden by law. When, therefore, he married a second time, he is presumed to have intended to break the law. And the breaking of the law is the crime. Every act necessary to constitute the crime was knowingly done, and the crime was therefore knowingly committed. *Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law.*” (Italics ours)

In the instant case, appellant knew that it was unlawful to receive the compensation checks in question if she married again, and in spite thereof, it is admitted that she did perform a subsequent marriage and thereafter accepted said compensation checks. Since she accepted the checks after her subsequent marriage to Lane, she is presumed to have intended to break the law; and to permit her to now say that she did not intend to defraud the Government at the time she accepted the checks in question, because she believed that her said marriage to Lane was void, would be novel indeed, and would throw the door open to fraud, perjury, and utter disregard for the laws of the land.

A further ground in support of the Court's reason for excluding appellant's Exhibits A, B and C for Identification is that they were all self-serving, and therefore not admissible.

Nielson v. United States,
24 F. (2d) 802 (C.C.A. 9).

Shreve v. United States,
103 F. (2d) 796 (C.C.A. 9).

Anderson v. United States,
152 Fed. 87 (C.C.A. 9).

In the Nielson case, *supra*, this Honorable Court held that the exclusion of testimony proffered to show that on the day before the raid on defendant's still, defendant purchased groceries and fishing tackle and said to a witness that he was going fishing, to be proper, for such testimony could in no sense be regarded as of the *res gestae*, and it was so obviously self-serving that the question of the propriety of excluding it requires no discussion.

If an Offer of Proof contains evidence that is inadmissible and also evidence that is admissible, it is not error for the court to sustain an objection to its introduction as a whole, it being the duty of the party offering the evidence to separate it and to have the court rule separately as to each fact.

McDuffie v. United States,
227 Fed. 961.

Todd v. United States,
221 Fed. 205.

Huntington v. United States,
175 Fed. 950.

Harrison v. United States,
200 Fed. 662.

Sage v. State,
22 Ariz. 151; 195 Pac. 533, citing *Harrison v. United States*, supra.

Criminal Law, 23 C.J.S., par. 1031,
page 408, and cases cited.

Since appellant's Offer of Proof in the court below was limited to disproving any criminal intent on the part of the appellant to defraud the United States Government, it would not be error for the court to refuse to admit it for any other purpose.

CONCLUSION

We respectfully submit that the record in this case fails to disclose that the ruling of the court complained of was erroneous. There is a total lack of any showing that appellant was damaged or prejudiced by the ruling of the court, as complained of in appellant's Specifica-

tion of Error I. The appellant, having had a fair and impartial trial, and her guilt having been established by the verdict of the jury, the conviction should be affirmed.

Respectfully submitted,

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